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JUDGES OF THE HIGH COURT

July—December, 1924.

Chief Justice.

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TABLE OF CASES REPORTED.

PRIVY COUNCIL.

	PAGE
Ashrafi Singh v. Narayan Singh	585
Banku Behari Dhur v. Galstaun	145
Behari Lal-Bulaki Ram v. Kundan Lal	322
Bholanath v. Balaram Das	258
Cowasji Edalji Dadachanji v. Ratanbai	850
Ganga Ram v. Natha Singh	64
Hari Baksh v. Babu Lal	938
The Imperial Tobacco Company of India, Ltd. v. Bonnan and Bonnan & Co.	69
Jagatput Singh v. Puran Chand Nahatta	136
Jamnabai v. Fazalbhoy Heptoola	164
Kodath Ambu Nair v. Secretary of State for India, I. L. R. 47 Mad. 572	35
Lachhmi Narayan Agarwala v. Rameshwar Prasad Singh	300
Lachmi Narain Marwari v. Balmakund Marwari	441
Lajwanti v. Safa Chand	935
Lal Ram Singh v. Deputy Commissioner of Partabgarh	260
Madhavrao Vaman v. Raghunath Venkatesh	248
Maharaja Kesho Prasad Singh v. Sheo Pargash Ojha	824
Maharu Walad Lotu v. Khandu Walad Hari Patil	128
Maung Dwe v. Khoo Haung Shein	853
Midnapore Zamindary Co., Ltd. v. Kumar Naresh Narayan Roy	23
Mitra Sen Singh v. Janki Kuar	591
Nayak Vajesingji Joravarsingji v. Secretary of State for India	574
Phiroshah Bomanji Petit v. Bai Goolbai	79
Rai Radha Kishun v. Jag Sahu	329
Rajah Bahadur Narasingerji Gyanagerji v. Rajah Panuganti Parthasarathy Rayanim Garu	809
Sahu Ram Kumar v. Muhammad Yaqub	180
Sanyellappa Hosmani v. Channappa Somasagar	401
Sat Narain v. Behari Lal and others	857
Secretary of State for India v. Roy Jatindranath Chowdhury	48

PAGE

Seth Hukumchand v. Raja Ram Bahadur Singh 562
Sir Rameshwar Singh v. Hitendra Singh 286
Sir Rameshwar Singh v. Hitendra Singh 294
Sri Rajah Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju 93
Vaidyanatha Aiyar v. Swaminatha Aiyar 361
Veerappa Chetty v. Arunachalam Chetty 168

HIGH COURT FULL BENCH CASES.

Doraivelu Mudaliar v. Natesa Gramani, I. L. R. 47 Mad. 761 211
Govinda Naidu v. Chengalroya Mudali 415
Krishnamachariar v. Rangammal, I. L. R. 47 Mad. 824 409
Manickam Pillai v. Mahudam Bathummal 398
Suyamprakasam v. Murugesa Pillai, I. L. R. 47 Mad. 774... 205
Syed Oohmer Sahib v. Gopaul, I. L. R. 47 Mad. 813 350
Theethumalai Gounder, *In re,* I. L. R. 47 Mad. 746 221
Vasireddi Sriramulu v. Putcha Lakshminarayana, I. L. R. 47 Mad. 783 273

HIGH COURT OTHER CASES.

Akshia Pillai v. Govindarajulu Chetti 549
Ammakannu Ayi v. Murugayya Odayar, I. L. R. 47 Mad. 850 85
Ananda Rao v. Appa Rao 700
Ananjaperumal Konar v. Pitchamuthu Nadar 910
Appalacharyulu v. Venkataramanujacharyulu 906
Appanna v. Akkamma 746
Areti Singarayya v. Areti Subbayya 517
Arunachalam Chettiar v. Latchumanan Chettiar 537
Arunachalam Goundan v. Katha Goundan 514
Athamsa Rowther v. Ganesan 641
Ayyaswami Aiyar v. Thirumala Aiyar 8
Baba Sah v. Purushothama Sah 932
Bolla Guruvayya v. Venkatarathnam, I. L. R. 47 Mad. 833 271
Brahmayya Lingam v. Mallamma 652
Chathu Nambiar v. Sakharan Nambiar 695
Chidambara Gurukkal v. Sundaram Pillai 598
Chidambaram Chettiar v. Kadar Mohideen Rowther 522
Chidambara Swamigal v. Ramakrishna Reddiar 683
Chittambala Mudaliar v. Parthasarathi Mudaliar 801

	PAGE
Chokkalinga Pillay v. Velayudha Mudaliar	448
Commissioner of Income-tax, Madras v. Binny & Co., Madras, I. L. R. 47 Mad. 837	242
Commissioner of Income-tax, Madras v. Nedungadi Bank, Ltd., Calicut, I. L. R. 47 Mad. 667	160
Dada Sahib v. Gajaraj Singh	928
Duraichami Tevar v. Adimuthu Nadan	728
Ediga Thimmiah, *In re*	355
Esufali Mohammedbhoy Allibhoy v. Thaha Ummal, I. L. R. 47 Mad. 610	150
K. M. P. R. N. M. Firm v. Somasundaram Chetti & Co.	844
Ganesa Mudaliar v. Gnanasikhamani Mudaliar	385
Gangulu Naidu v. Chengama Naidu	871
Ganjain Manikyamba v. Pasala Mallayya	393
Govindasami Odayar v. The Union Bank, Ltd., Kumbakonam	678
Hussain Reddy v. Venkata Reddy	545
Hussain Saib, *In re*	661
Jagannadham v. Rama Rao	917
Jagannadha Reddiar v. Lakshmana Reddiar	475
Jambulinga Chetti, *In re*	437
Janoo Hassan Sait v. Mahamad Ohuthu, I. L. R. 47 Mad. 877	356
Kajulni Swami v. Sooryanarayana Raza	269
Kalyani Pillai v. Thiruvenkatasami Aiyangar, I. L. R. 47 Mad. 618	154
Kanakasabapathy Mudaliar v. Hajee Oosman Sahib	791
Kandaswami Chetti v. Adimoola Chetti	704
Kanniappa Mudali v. Raju Chettiar, I. L. R. 47 Mad. 605	16
Karnati Munayya v. Milta Krishnayya	737
Krishna Aiyar v. Pachaiyappa Chetti	540
Krishna Reddi v. Ramakrishnayya Chetti	667
Kumaragurudasa Swamigal v. Krishnaswami Mudaliar	664
Kunhammad Kutty v. Parapravan Cheria Mammad	679
Kuppakkal v. Mathan Chettiar	477
Kuppammal v. Muniappa Chetti	655
Kuppa Reddiar, *In re*, I. L. R. 47 Mad. 846	232
Kuppu Odayar v. Poomalai Goundan	439
Kuppuswami Goundan v. Marimuthu Goundan	487
Kutty Goundan, *In re*	689
Lakshmanan Chettiar v. Sella Muthu Naicker,	602
Lakshmanan Chetti v. Subbiah Chetti	389
Lakshmikutti v. Mariathummal	798

	PAGE
Latchayya v. Kotamma	743
Lingayya Chetti v. Chengalammal	776
Madras and Southern Mahratta Railway Co., Ltd. v. Jayammal	887
Maliyakkal Kunhibi v. Secretary of State for India	379
Mallampati Narasimham v. Sub-Inspector of Police	447
Maruthavanaswami v. Subramania Thambiran	770
Meyappa Chettiar v. Chidambaram Chettiar	397
Mohamed Esuf Rowther v. Sultan Abdul Kadir	20
Mollaya Padayachi v. Krishnaswami Aiyar	622
Movva Subbarao v. Movva Adenma	465
Muhammad Abdul Gaffur Rowther v. Muhammad Sams-ud-din Rowther	730
Nagappa Pillai v. Arunachalam Chetty	876
Nagasami Aiyar v. Ramasami Aiyar	755
Nallagatti Goundan v. Ramana Goundan	783
Narasimudu v. Basava Sankaram	749
Narayanamurthi v. Achayya Sastrulu	714
Narayanan Nambudri v. Ravunni Nair	686
Official Receiver, Tanjore v. Vedappa Mudaliar	431
Palanisami Pillai v. Srinivasarangachariar	795
Palani v. Sethu, I. L. R. 47 Mad. 706	155
Pallayya v. Bhimaraju	535
Parvati Ammal v. Venkatarama Aiyar	316
Perayya v. Venkayamma	14
Peri Ramaswami v. Chandra Kottayya	840
Periyanayaki Ammal v. Rathnavelu Mudaliar	310
Pitchakkuttiya Pillai v. Doraiswami Mooppanar	498
Pitchi Reddi v. Bharata Sastri	532
President, Taluk Board, Hospet v. Jutur Chandrappa	774
The Public Prosecutor v. Katta Prakasam	658
Public Prosecutor v. Varadarajulu Naidu, I. L. R. 47 Mad. 716	470
Puttayya v. Puttannayya	608
Radhakrishna Rao v. Venkata Rao	552
Rajagopalachariar v. Bashyachariar	520
Rajagopala Aiyar v. Arunachalam Aiyar	305
Rajagopala Padayachi v. Varadaraja Padayachi	605
Rajamanicka Chettiar v. Manickam Chettiar	723
Rajarathna Naidu v. Ramachandra Naidu	434
Rajitagiri v. Bhavani Sankaran, I. L. R. 47 Mad. 641	4
Ramachari v. Krishnamachari	460

PAGE

Ramalinga Adaviar v. Meenakshisundaram Pillai 833
Ramanadhan Chettiar v. Subramania Chettiar 759
Ramanathan Chettiar v. Mohideen Saheb 428
Ramanathan Chettiar v. Sivarama Subramania Aiyar I. L. R. 47 Mad. 722 373
Ramani v. Narayanaswami Aiyar 192
Ramanuja Naidu v. Alagappa Chettiar 656
Ramappa Chettiar v. Ekambara Padayachi, I. L. R. 47 Mad. 651 13
Ramasubbu Naicker v. Dorai Raj 735
Ramaswami v. Muthayya Chetti 829
Ramaswamy Nayakar v. Meenakshisundaram Chettiar 922
Ruckmani Ammal v. Veerasami Aiyangar 370
Rukmani Ammal v. Rajagopala Aiyar 495
Saraswathi Ammal v. Dhanakoti Ammal 614
Sardar Khan Sahib v. Athanlla 926
Satyarazu v. The Guntur Cotton, Jute and Paper Mills Co., Ltd. 710
Sayyed Gulam Gouse Sha Sahib Kadiri v. Dost Mohammad Khan Sahib 745
The Secretary of State for India v. Raghavachariar I. L. R. 47 M. 861. 503
Secretary of State for India v. Ramanujachariar 780
Seethayamma, *In re* 919
Seshamma v. Venkata Rao 235
Sesha Sastrulu v. Venkamma 1
Seshayya v. Subbayya 646
Sinnaswami Chettiar v. Aligi Goundan 530
Sivapatha Mudaliar v. Abdul Razak 199
Sivarama Aiyar v. Gopalakrishna Chettiar 337
Somu Pillai v. Krishna Pillai 481
Souriraja Naidu v. Rajagopalan 302
Sree Rajah Parthasarathy Appa Row v. Turlapati Subba Row 483
Srinivasa Aiyangar v. Vellayan Ambalam 913
Srinivasachariar v. Appavoo Reddy 720
Srinivasachariar v. Venkatarama Aiyar 762
Subbarama Aiyar v. Subba Aiyar 523
Subbarayudu v. Narasimha Rao 558
Subbarayudu v. Subbanna 765
Subbayya v. Sree Raja Venkataramiah Apparao Bahadur... 469
Subramanian v. Ramachandra Rao 908

	Page
Surya Rao Bahadur Garu, Rajah of Pithapuram v. Secretary of State for India	784
Swaminatha Aiyar v. Ramier	671
Thammiah Naidu v. Attili Musaliah	383
Thazhath Soopi v. Abdulla	554
Venkatachalam Chettiar v. Ponnuswami Aiyangar	312
Venkatanarayana Chetty v. Sevugan Chetty	240
Venkatapathi v. Ramadas Rao	528
Venkataramana Chatta v. Krishna Bhatta	307
Venkatramana Pai v. Sampa	256
Venkatasubba Chettiar v. Sesha Aiyar, I. L. R. 47 Mad. 700	201
Venkiah, *In re*	662
Venkobacharlu v. Radhabayamma	640
Venkobacharlu v. Radhabayamma	612

TABLE OF CASES CITED.

A

	Page
Abdul Aziz Molla v Ebrahim Molla, (1904) I L R 31 C 965	648
Abdul Rahman v. Amin Sharif, (1918) I L R 45 C 780	525
Abdul Razak v Basir-ud-din Ahmed, (1910) 14 C W N 586 ...	784
Abdul Saffur Rowther v Hamida Bivi Ammal. (1919) I L R 42 M 661: 36 M L J 456	312, 316
Abhi Misser v Lachmi Narain, (1900) I L R 27 C 566 ...	223, 227, 231
Admiralty Commissioners v S S Volute, (1922) 1 A C 129	902
Agar Ellis, *In re*, 24 Ch D 317	618, 619
Alagappa v Muthiah, (1917) I L R 41 M 237 33 M L J 173	745, 746
Alderson v White, (1858) 2 De G & J 97	811
Alia Khan v Kanshi Ram, (1913) P R 176 (Civil Judgments) ...	64, 68
Amarchand Chamaria v Banwari Lal Rakshit, (1921) I L R 49 C 608 ...	143
Ambica Pershad Singh v Surdhari Lal, (1884) I L R 10 C 851 (F B).	538
Amies v Stevens, 1 Strange 127	153
Ammalu Ammal v Namagiri Ammal, (1917) 33 M L J 631	768
Ammani Ammal v Ramaswami Naidu, (1918) 37 M L J 113	88, 636
Ammani v Jagannatha Reddi, (1915) M W N 442	438
Ammukutty v Manavikraman, (1920) I L R 43 M 793	649
Anakaran Kasmi v Saidamadath Avullah, (1879) I L R 2 M 79 ...	436
Anakkaran Puthiavalappil Mussan Haji v Thiyan Thavara Koran and others, (1921) 41 M L J 392	729
Ananda v Upendra, (1921) 34 C L J 293 ...	276, 277, 279
Anantaramier v Kuttimalu Kovilamma, (1916) 30 M L J 611 at 613 ...	561
Anantha Goundan v King-Emperor, (1904) 15 M L J 224	748
Andrews, *In re*, 8 Q B 153 ...	618, 620
Anivillah Sundararamayya v Cherla Seethamma, (1911) I L R 35 M 628 : 21 M L J 695	467
Annamalai v Rangaswami, (1883) I L R 6 M 365 ...	428, 429
Annapurnamma v Akkayya, (1913) I L R 36 M 544 : 21 M L J 338 (F B)	840, 841 842, 843, 844,
Annoda Prasad Banerjee v Noba Kissore Roy, (1905) 9 C W N 952...	829, 832
Appan Patracharlar v Srinivasacbariar, (1917) 32 M L J 364	467
Appasami Pillai v Somasundara Mudaliar, (1902) I L R 26 M 437	933
Ardajeri Rama Reddi v Karpi Sivaga, (1913) M W N 971 ...	419, 426, 427
Arimuthu Chetti v Vyapuri Pandaram, (1910) I L R 35 M 588 : 21 M L J 505 ...	761
Arumilli Perrazu v Subbarayadu, (1921) I L R 44M 656 at 664 : 41 M L J 33 (P C)	779
Arunachalam Chetty v Raman Chetty, (1914) 16 M L T 614	484, 486
Arunachala Pillai v Sampurna Thachi, (1907) 27 M L J 485	467
Ashi Bhusan Dasi v Pelaram Mandal, (1913) 18 C L J 362 ...	832
Ashurfi Singh v Biseswar Partap Narayan Sahi, (1922) I L R 1 Pat 295	590
Ashutosh Sikdar v Beharilal Kirtania, (1907) I L R 35 C 61	800
Asimaddi Sheikh v Sundari Bibi, (1911) I L R 38 C 339	551

PAGE

Aslatt v Corporation of Southampton, (1880) 16 Ch D 143 204
Athappa Chetty v Ramanathan Chetty, (1919) 37 M L J 536 553
Athlumney, *In re*, (1898) 2 Q B 547 at 551 353
Attermony Dossee v Hurry Doss Dutt, (1881) I L R 7 C 74 832
Ayerst v Jenkins, (1873) L R 16 Eq 27 ... 652, 653, 654
Ayisa Bivi Ammal v Kalandarasa Rowther, (1924) 46 M L J 501 ... 916
Ayya Mudali Velan v Veerayee, (1920) I L R 43 M 812 39 M L J 218 371, 372
Ayyavayyar v Rahimansa, (1890) I L R 14 M 170 386, 388
Ayyavu Moopanar v Niladatchi Ammal, (1862) 1 M H C R 45 777

B

Bai Mahakore v Bai Mangla, (1911) I L R 35 B 403 793
Balabux Ladhuram v Rukhmabai, (1902) I L R 30 C 725 (P C) 938, 946
Balasubramania Chetty v Swarnammal, (1913) I L R 38 : M 199 25 M L J 367 270
Balkishen Das v W F Legge, (1899) I L R 22 : All 149 (P C) : 26 I A 58 132, 388, 811, 8187
Balkishen Das v Ram Narain Sahu, (1903) I L R 30 C 738 ...938, 946, 947
Balkrishna v Ramkrishna, (1920) I L R 45 Bom 353 401, 408
Balwant Singh v R Clancy, (1912) I L R 34 A 296 88, 636
Bamford v Baron, (1788) 2 T R 594 (N) 497
Baneswar Pramanik v Tarapada Bhattacharjee, (1917) 41 I C 872 ... 276, 278
Bapu v Bapu, (1912) I L R 39 Mad 750 : 22 M L J 419 (F B). 883, 884, 885, 886
Barber Maran v Ramana Goundan, (1897) I L R 20 M 461 : 7 M L J 269. 840, 841 842, 843,
Barnes v Addy, 9 Ch A 244 206, 208
Barney v Barney, (1892) 2 Ch 265 206, 208
Basaveswara Swami v Bellary Municipal Council, (1912) I L R 38 M 6 : 23 M L J 479 473, 474
Bedford, Duke of v Ellis, (1901) A C 1 at 8 542
Bellayya v Jaganatha, (1883) I L R 7 M 307 538
Bhagabati Barmanya v Kali Charan Singh, (1911) I L R 38 Cal 468 at 472 : 21 M L J 387 (P C) ... 311, 341, 342
Bhagwan Singh v Nazar Ali Khan, (1914) I L R 36 A 272, 276 ... 623, 640
Bhagwati Prasad v Radha Kishen Sewak Pande, (1893) I L R 15 All 304 (P C) ... 87, 636
Bhaidas Shivdas v Bai Gulab, (1921) I L R 45 B 718 : 40 M L J 519 (P C) ... 883, 885, 886
Bhaskerappa v Collector of North Canara, (1879) I L R 3 B 452 ... 35, 38, 41
Bhawani Kuar v Mathura Prasad Singh, (1912) I L R 40 C 89 (P C). 637
Bhavanishankar Shevakram v Purusadri Kalidas, (1882) I LR 6 Bom 292 at 297 831
Bhola Pershad v Ram Lall, (1896) I L R 24 C 34 (P C) 588
Bhubaneswar Prasad Singh v Tilakdhari Lal, (1918) 4 Pat L J 135 ... 270, 271
Bhupendra Narayan Dutt v Rajendra Nath Dutt, 18 I C 455 538
Bihari Lal v Sat Narain, (1922) I L R 3 Lah 329 491
Bilas Kunwar v Desraj Ranjit Singh, (1915) I L R 37 All 557 416
Bindraban Behari v Jamuna Kunwar, (1902) I L R 25 A 55 ... 485
Bir Bhaddar Sewak v Sarju Prasad, (1887) I L R 9 All 681 ; 7 A W N 229 ... 87
Blott's Case, (1921) A C 171 244, 245, 247, 248
Boidyo Gauranga Sahu v Suderi Mata, (1916) I L R 40 M 612 : 32 M L J 597 369

PAGE

Bommaraja Bahadur v Venkatadiri Naidu, (1858) 7 M I A 128 39
Bouch v Spronle, 12 A C 385 247, 248
Bower v Hett, (1895) 2 Q B 51 at 56 760
Brahmanna v Ramakrishnama, (1894) I L R 18 M 250 : 5 M L J 89... 748
Brahmayya v Achiraju, (1922) I L R 45 M 716 43 M L J 229 (F B). 394
Brij Narain v Mangala Prasad L R 51 I A 129 864
Brindley In re, (1906) 1 K B 377 ... 497
British-American Tobacco Co. v Mahboob Baksh, (1910) I L R 38 C 110 73
Budhu Ram Houda Ram v Ram Jan, (1920) 59 I C 676 644
Burchell v Hickison, 50 L J Q B 101 ... 893
Burt v British Life Assurance Association, 4 De G & J 169 : S C 45 E R 62 543

C

Cartlidge v Cartlidge, 2 Sw & Tr 567 : 31 L J (P & M) 85 618
Cassaboglow v Gibb, (1883) 11 Q B D 797 312, 313
The Catharine Chalmers, In re 7 B & C 219 152
Chadha v Emperor, (1916) 14 A L J 851 376
The Chairman, Municipal Council, Srirangam v Subba Pandithar, (1913) I L R 38 M 456 : 25 M L J 297 ... 473, 474, 475
Chakkara Kannan v Kunhi Pokker, (1915) I L R 39 M 317 : 21 M L J 481 (F B) ... 681
Chalavadi Kotiah v Poluri Alamelammah, (1907) I L R 31 M 71 18 M L J 46 608, 610
The Challenge and Due D'Aumale, (1904) Prob. Div. 41 358
Chandi Persbad v Abdul Rahiman, (1895) I L R 22 C 131 375
Chandra Kishore v Basarat Ali, (1917) 27 C L J 418 883
Chappan v Moidin Kutty, (1898) I L R 22 M 68 : 8 M L J 31 (F B) ... 882
Charlapathi Chuna Cunniah v Cota Nammalwariah, (1909) I L R 33 M 91 727
Chellam Naidu v Ramaswami, (1891) I L R 14 M 379 . 1 M L J 242... 748
Chhabile Ram v Durga Prasad, (1915) I L R 37 All 296 at 298 745, 746
Chhattar Singh v Tej Singh, (1920) I L R 43 All 101 275
Chhittar Mal v Jagan Nath Prasad, (1906) I L R 29 A 213 686
Chidambara v Muthaya, (1882) I L R 5 Mad 330 704, 707
Chidambaram Chetti v Karuthan Chetti, (1919) 89 MLJ 511 at 514 ... 556
Chidambaram Chetty v Theivanai Ammal, (1923) I L R 46 M 768 : 45 M L J 346 270
Chidambaram Pillai v Veerappa Chettiar, (1917) 22 M L T 380 767
Chidambaratha Goundan v Sellappa, (1919) 10 L W 620 ... 724, 725, 726
The Chief Commissioner of Income-tax v The Eastern Extension Australasia and China Telegraphic Co., Ltd (1921) I L R 44 M 489 : 40 M L J 560 ... 162
Chinnappan Chetty v The Secretary of State for India in Council, (1917) I L R 42 M 239 at 259 · 36 M L J 124 (F B) ... 507
Chinnu Pillai v Kalimuthu Chetti, (1911) I L R 35 M 47 : 21 M L J 246 ... 398
Chintamony Dassi v Raghunath Sahoo, (1895) I L R 22 C 981 644
Chona Lal v Ananta Pershad, (1898) I L R 25 C 233 376
Chotalal Lallubhai v Nathabhai Bechar, (1900) I L R 25 B 151 748
Choudhri Gur Narayan v Sheo Lal Singh, (1918) 36 M L J 68 (PC)... 637
Chunilal v Bai Muli, (1899) I L R 24 Bom 420 342

PAGE

Chunilal Jethabhai v Dahyabhai Amulakh, (1907) I L R 32 Bom 14 at 24, 25 411
Chunni Kuai v Rup Singh, (1886) I L R 11 A 57 ... 650
Chutterput Singh v Rai Bahadur Soomarimull, (1916) 20 C W N 889. 5
City of Peking, *In re* 14 A C 40 153
Colquhoun v Brookes, (1889) 2 Q B 547 at 551 353
Comfort v Betts, (1891) 1 Q B 737 ... 528, 530
Cook v Midland Great Western Railway of Ireland, (1909) A C 229. 891, 893, 894, 903, 904
Cook v Sprigg, (1899) A C 572 574,578
Corbett v Hill, (1870) L R 9 Eq Cases 671 474
Corcoran Gurney, *In re* 1 E & B 456 ... 152
The Corporation of Ludlow, etc. v Greenhouse (1827) 1 Bligh's Reports N S 17 366

D

Darves Haji Muhamad v Jainudin, (1906) I L R 30 B 603 746
Dasi Muthukannu v Shanmugavelu Pillai, (1905) I L R 28 M 413 ... 6:2, 653, 654
Davey v London and South Western Railway Company, 12 Q B D 71. 891, 892
Davies v Mann, (1842) 16 M W N 546 902
Davies v Garrett, 6 Bing 716 153
Davies v Thomas, 1 Russel and Mylne 506 607
Deb Kumar Roy v Debnath Barnes, (1920) 64 I C 738 648
Debnarayana Dutt v Chunilal Ghose, (1913) I L R 41 Cal 137 517, 518
Defries v Electric Co., Ltd., 23 Patent Cases 341 73
Deivanayaga Padayachi v Muthu Reddi, (1920) I L R 44 M 329 652,653,654
The Delta, *In re* (1876) 1 Prob Div 393 358
Denny (Trustee) v Denny and Warr, (1919) 1 K B 583 431, 433
Dental Manufacturing Co. v De Prey and Co., (1912) 3 K B 76 78
Deonandan Prasad Singh v Janki Singh, (1920) 5 P L J 314 154
Deo Nandan Prasad v Janki Singh, (1916) I L R 44 C 573 (P C) 757
Dhurham Brothers v Robertson, (1898) 1 Q B 765 530
Dias v De Livera, (1879) L R 5 A C 123 342
Diggle v Higgs, 2 Ex D 422 880
Dinabandhu Nandi v Mashuda Khatun, (1912) 16 C L J 318 ... 276
Dinobundhu Shaw Chowdhry v Jogmaya Dasi, (1901) I LR 29 C 154 at 166 : 12 M L J 73 (P C) 916
Dormer v Fortesche, 3 Atk 244 211
Duraiswami Sastrigal v Venkataram Iyer, (1911) 21 M L J 1088 ... 392, 393
Durgadut Singh v Maharaja Sir Rameshwar Singh Bahadur, (1909) I L R 36 C 943 296
Dwarakanath Ash v Priya Nath Malvi, (1915) 36 I C 792 517,518

E

Ebrahim Bhai v Fulbhi, (1902) I L R 26 B 577 431, 433
Eda Punnayya v Jangalu Rama Kotayya, (1920) M W N 1 ... 276, 278
Edward Russel ; William Hayward v Elizabeth Hammond (1742) 26 E R 9 at 11 433
Emperor v Angnu Singh, (1922) I L R 45 A 109 ... 694
Emperor v Madan Mandal (1913) I L R 41 C 662 283,227,230,231
Emperor v Matan, (1910) I L R 33 A 163 659
Empress Engineering Company, *In re* 16 Ch D 125 at 130 519
Enamul Huq v Ekramul Huq (1897) I L R 25 C 294 ... 464
Errikulappa Chetti v The Official Assignee of Madras, (1915) I L R 39 M 908 523, 526

PAGE

Espley v Wilkes, (1872) L R 7 Ex 298 ... 478, 479, 480
Ex parte Alsop, (1859) 1 De F & J 289 497
Ex parte Cooke, (1876) 4 Ch D 123 708
Ex parte Hopkins, 3 P & W Ms. 151 619, 620
Ex parte Smyth, (1818) 1 Swans 337 83
Ex parte Stray, (1867) L R 2 Ch A 374 497

F

Fairman v Perpetual Investment Building Society, (1923) A C 74 at 80. 894, 904
Faizar Rahman v Maimuna Khatun, (1913) 17 C W N 1233 ... 756, 757
Fakirchand Motichand v Hurruckchand, (1883). I L R 7 B 438 490,863,864,866,869,871
Fatehchand v Rup Chand, 43 I A 183 590
Fazal v Hashmathi, (1915) 31 I C 914 644
Ferhall v Ferhall, (1871) 7 Ch A 123 767
Fischer v Nagappa Mudali, (1909) I L R 33 M 258 648, 649
Fletcher v Inglis, 2 B & Ald 315 152
Foster v Mackinnon, (1869) 4 C P 704 ... 132
Furness Railway Company v Cumberland Co-operative Building Society, 52 L T R 144 (H L) 480

G

Gaffney v The Dublin United Tramways Company, (1916) Irish Rep Vol II, p 472 ... 892
Gajapathi Maharaju Garu v Sondi Prahlada Bissonji Ratno, (1913) 14 M L T 562 ... 560
Gallamudi Venkatasubba Row v Chaparala Rosayya, (1914) M W N 714 ... 523, 526
Ganesh Rao v Tuljaram Rao, (1913) I L R 36 M 295 : 25 M L J 150 (P C) 389, 392, 498, 501
Ganesh Rao v Tuljaram Rao, (1909) 21 M L J 1093 ... 390, 391, 393
Ganga Sahai v Lekhraj Singh, (1886) I L R 9 A 253 at 313 ... 778
Gangayya v Venkataramayyah, (1917) I L R 41 M 454: 34 M L J 271. 555
Gangu v Chandrabhagabai, (1907) I L R 32 Bom 275 ... 401, 406
Garbutt v Durham Joint Committee, (1904) 1 K B 522 : (1904) 2 K B 514, 521, 522 ... 363
Ghantasala Seetharamiah v Tadepalli Pitchayya (1914) 28 I C 859 at 860 ... 912
Ghulam Abbas Khan v Amatul Fatima, (1921) I L R 43 A 297 : L R 48 I A 135 : 40 M L J 577 264
Girdhari Lall v Kantoo Lall, L R 1 I A 321 ... 864
Glasgow Corporation v Taylor, (1922) 1 A C (H of L) 44 894
Glegg v Bromley, (1912) 3 K B 479, 490 ... 125
Gobinda Chandra Pal v Kailas Chandra Pal, (1917) I L R 45 C 530 at 536 ... 799, 800
Gobind Chunder Nundy v Srigobind Chowdhry, (1897) I L R 24 Cal 380 306
Gogarty v Horkins, (1906) 1 I R 173 480
Gokaldas v Puranmal Premsukhdas, (1884) I L R 10 C 1035 (P C)... 917
Gopala Aiyangar v Mammachi Reddiar, (1922) 17 L W 254 ... 623, 635, 640
Gopala Chetty v Subbier, (1903) I L R 26 M 604 : 13 M L J 308 ... 615
Gopala Chetty v. Vijayaraghava Chariar, (1922) I L R 45 M 378 (P C) : 43 M L J 305 829, 831

PAGE

Gopala Row v Maria Susaya Pillai, (1906) I L R 30 M 274 : 17 M L J 225 514, 516
Gopal Dasu v Rami, (1921) I L R 44 M 946 : 41 M L J 194 915
Gopeekristo Gosain v Gangapersad Gosain, (1854) 6 M I A 53 628
Gopi Narain Khanna v Bansidhar, (1905) I L R 27 All 325 (P C) ... 322
Gopinath Adhikary v Gadadhar Das, (1906) I L R 33 C 1020 at 1021 736
Gossling, *In re*, (1902) 1 Ch 945 852
Gosta Behari v Shankar Nath, (1916) 36 I C 510 at 511 915
Gotepati Subban v Gotepati Narasamma, (1914) 27 M L J 486 703
Goverdhana Doss v Veeraswami Chetty, (1902) I L R 26 M 587 604
Governors of Magdalen Hospital v Knotts, 4 A C 324 592, 598
Govinda Chetti v Perumal Chetty, (1913) 38 M 489 ... 440
Govindan Nair v Sankaran Nair, (1908) ILR 32 M 351: 19 MLJ 350. 697, 698
Govind Atmaram v Santai, (1887) I L R 12 B 270 15
Gregory v Williams, (1817) 3 Mer 582 ... 517, 518, 519
Grild v General Screw Colliet Co., L R 1 C P 612 152
Grish Chunder Lahiri v Shoshi Shikhareswar Roy, (1900) I L R 27 C 951 at 967 733
Grove v Portal, (1902) 1 Ch D 727 ... 307, 308, 309
Gulab Kunwar v Thakur Das, (1902) I L R 24 A 464 644
Gunnaiyan v Kamakchi Aiyar, (1902) I L R 26 M 339 at 346 ... 561
Gur Narayan v Sheolal Singh, (1918) I L R 46 C 566 : 36 M L J 68 (P C) 415, 416
Gurudas Pyne v Ram Narain Sahu, (1884) I L R 10 C 860 (P C) ... 485
Guruswami Pillai v Sivakami Ammal, (1895) I L R 18 M 347 5 M L J 106 341

H

Hafez Mahomed Ali Khan v Damodar Pramanick, (1891) I L R 18 C 242 761
Hall v Borrows, 33 L J Ch 204 73
Hallett's Estate, *Re* : 13 Ch D 696 708
Hampden v Walsh, 1 Q B D 189 880
Hanuman Pershad Pandey v Mussumat Baboojee Munraj Koonwaree, 6 M I A 393 at 411 88
Hanuman Prasad v Muhammad Ishaq, (1905) I L R 28 All 137 276, 277
Harbans Lal v Kundan Lal, (1898) I L R 21 A 140 551
Harding v Wilson, 2 Bar & Cress 96 (107 E R 319) 480
Hari Charan v Girish Chandra, (1910) I L R 38 C 68 376
Hari Nath Dass v Syed Hossain Ali, (1905) 2 C L J 480 649
Hari Telang v Queen Empress, (1900) I L R 27 C 781 694
Harmanoje Narain Singh v Ramprosad Singh, (1907) 6 C L J 462 ... 332, 333, 335
Harmukh Rai Munna Lal v Radha Mohan, (1919) 54 P R 423 ... 862, 868, 871
Harriet O Hara, *In re*, (1900) 2 I R 232 620
Harris v Brown, (1901) I L R 28 Cal 621 342
Hazari Mall Babu v Abaninath Adhurijya, (1912) 17 C W N 280 267
Hickling v Fair, (1899) A C 15 at 35 343
Hira Singh v Ganga Sahai, (1883) I L R 6 All 322 (P C) 932
Hira Singh v Ghulam Qadir, (1918) 48 I C 399 276
Holt & Co v Collyer, 16 Ch D 718 844, 848
Hosllow v Jackson, 8 B and C 221 ... 880
Hook v Advocate General of Bengal, (1921) L R 48 I A 187 40 M L J 423 286, 293

PAGE

Hoosain Bhai v Haji Ismail Sait, (1903) 5 Bom L R 255 432
Houghton, *Re* (1915) 2 Ch 173 405
Hughes v Macfie and Abbott v Macfie, 2 H & C 744 894
Husain Bakhsh v Rahman Husain, (1888) I L R 11 A 128 ... 650
Hussain Begum v The Collector of Muzaffarnagar, (1889) I L R 11 A 176 at 182 882, 886
Hutchison v Gillespie, 11 Exch 798 831

I

Ibrahim Walad Goolam v Nihalchand, (1919) I L R 44 B 366 ... 799
Idubilly Siyyaddi v Sri Rajah Viswaswara Nissanka, (1915) 18 M L T 142 ... 559, 560, 561
Imperial Tobacco Co (Newfoundland) v Duffy, (1918) A C 180 ... 73
Indur Chunder Singh v Radha Kishore Ghose, (1892) I L R 19 C 507 (P C) 207
Inhabitants of Denton, 18 Q B 761 194
Inland Revenue Commissioners v Blott and Inland Revenue Commissioners v Greenwood, (1920) 1 K B 114, 133 246, 247
Ireland v Livingston, L R 5 H L (E & I A C) 395 at 408 312, 313
Ismail Khan Mahomed v Jaigun Bibi, (1900) I L R 27 C 570 at 582... 601
Isti Panku Menon v Dharman Achan, (1917) I L R 41 M 488 518
Iswaram Pillai v Sonnevaveru Taragon, (1913) I L R 38 Mad 753 517, 519

J

Jadunath Chakerbutty v Mr James Tweedie, 11 W R 20 88,92
Jagabandhu v Haladhar, (1917) 27 C L J 110 ... 434, 435
Jagabhai Lalubhai v Vijbhukandas Jagjivandas, (1886) I L R 11 B 37 ... 493, 862, 866
Jagat Chandra v Queen Empress, (1899) I L R 26 C 786 375
Jago Singh v Emperor, (1919) 53 I C 820 926, 927
Jamahar v Askaran, (1915) 22 C L J 27 15
Jamait-un-nissa v Lutf-un-nissa, (1885) I L R 7 A 606 ... 744
James Morrison & Co v Shaw Savil and Abbion Co., Ltd, (1916) 2 K B 783 ... 153
Jamna Bai v Vasanta Rao, (1916) I L R 39 M 409 : 31 M L J 18 (P C). 502
Jamnadas v Ram Autar Pande, (1911) I L R 34 A 63 ... 519
Janaki Ammal v Narayanaswamy Aiyar, (1916) L R 43 I A 207 : 31 M L J 225 ... 824, 827
Janaki Das v The East Indian Railway Company, (1884) I L R 6 A 634 793
Janaki Nagasami Aiyar v Ramaswamy Aiyangar, (1919) 11 L W 6 ... 523, 526
Janakiram Pillai v Venkiah Chetty, (1911) 10 M L T 21 778
Jan Ali v Ram Nath Mundul, (1882) I L R 8 C 32 ... 366
Jatindra Mohan Tagore v Ganendra Mohan Tagore, (1872) 9 Beng L R 377 (P C) 266
Jatti v Banwari Lal, (1923) I L R 4 Lah 350 : 45 M L J 356 ...938, 946, 947
Jegon v Vivian, (1870) 6 Ch 742 923, 924
Jenkins v The Great Western Railway, (1912) 1 K. B. 525 ... 893, 903
Jhanda Singh v Wahid-ud-din, (1916) I L R 38 A 570 : L R 43 I. A 284 ... 811
Jhapajhannessa Bibi v Bama Sundari Choudhurani, (1912) 16 C W N 1042 486

PAGE

John Wallingford v The Directors of the Mutual Society, (1880) 5 A C 685 ... 833, 835, 837, 838
Jones Bros, *In re* (1912) 3 K B 234 ... 497
Joseph Travers & Sons, Limited v Cooper, (1915) 1 K B 73 ... 153
Joy Chandra Banerjee v Sreenath Chatterjee, (1904) I L R 32 C 357 at 361 ... 729
Jugmohandas v Sir Mangaldas Nathubhoy, (1886) I L R 10 Bom 528. ... 267
Jyoti Prakas v Bagala, (1922) 36 C L J 124 ... 194

K

Kadma Pasin v Muhammad Ali, (1919) I L R 41 A 399 ... 799
Kalappa Kamthi v Kachur Sakha Rama Rao, (1915) 29 I C 898 ... 388
Kalianna Mudali v The Secretary of State for India in Council by the Collector of Salem, (1915) 31 I C 982 ... 503, 504, 505, 506. 510, 513
Kali Charan Nath v Sukhoda Sundari Debi, (1915) 20 C W N 58 ... 829, 832
Kali Krishna Pal Chowdhry v Srimati Jagattara, (1868) 2 Ben L R 139 ... 485
Kalliani Amma v Govinda Menon, (1911) I L R 35 M 648 : 22 M L J 23 ...679, 681, 682
Kamakshi Achari v Appavu Pillai, (1863) 1 M H C R 448 ... 879
Kanakammal v Baktavatsulu Naidu, (1922) 44 M L J 23 ... 727
Kandarpa Nath Ghose v Jogendra Nath Bose, (1910) 12 C L J 391 ... 588
Kandukuri Mahalakshmamma Garu v The Secretary of State for India (1909) I L R 34 M. 295 : 20 M L J 823 ... 508
Kanniappa Chettiar v Ramachandra Aiyar, (1922) 46 M L J 407 ... 353, 354
Karri Venkanna Patrudu, *In re*, (1915) 18 M LT 591 ... 882, 883, 884
Kasturchand Lakhmaji v Jakhis Padia, (1915) I L R 40 Bom 74 ... 388
Kavali Sankara Rao v Ramakrishnayya, (1923) 46 M L J 184 ... 749, 754
Kearly v Thompson, (1890) 24 Q B D 742 ... 881
Kelu Nambiar v Chathu Nambiar, (1918) 9 L W 84 ... 613
Kendall v Hamilton, 4 A C 504 ... 86, 87
Kerwick v Kerwick, (1920) I L R 48 C 260 at 274 : 39 M L J 296 (PC). ... 629, 630
Kesho Prasad Ojha v Sheo Pragash Ojha (1921) I L R 44 A 19 ... 825
Keymer v Viswanathan Reddi, (1916) I L R 40 M 112 : 32 M L J 35 (P C) ... 358, 359
Khagaram v Ramshankar Das Pramanick, (1914) I L R 42 C 652 ... 911, 912
Kheta Mal v Chuni Lal. (1879) I L R 2 A 173 at 180 ... 497
Khiarajmal v Daim, (1904) 32 I A 23 ... 280, 282
Khwaja Muhammad Khan v Hussain Begam, (1910) IL R 32 A 410 ... 510
Kisho Prasad Singh v Sheo Pargash Ojha, (1921) I L R 44 All 19 (F B) ... 545
Komma Somakka v Kovidala Pedda Ramiah, (1911) 10 M L T 483 ... 655, 656
Koroth Amman Kutti v Perungottil Appu Nambiar, (1906) I L R 29 M 322 ... 681
Kotikalapudi Kattayya v Sree Rajah Venkataramayya Row Bahadur, (1920) 39 M L J 571 ... 469
Kripasindhu Naiko and Harikrishna Naiko, *In re*, (1918) 8 L W 461 at 464 ... 692, 693
Krishna Aiyar v Chakrapani, (1915) 28 I C 475 ... 501
Krishna Behari Roy v Bunwari Lall Roy, (1875) I L R 1 C 144 ... 613
Krishna Chettiar v Nagamani Ammal (1915) I L R 39 M 915 ... 768, 769
Krishna Hande v Padmanabha Hande, (1913) 25 M L J 442 ... 501

PAGE

Krishna Shetti v Gilbert Pinto, (1918) I L R 42 M 654 at 660 : 36 M L J 367 ... 608
Krishnaswami Aiyangar v Subramania Ganapatigal, (1917) 35 M L J 304 ... 738, 739
Kulada Prasad Chowdhury v. Ramananda Pattnick (1921) I L R 48 C 1036 ... 607
Kuldip Singh v Kuldip Chowdhuri, (1917) 3 Pat L J 63 ... 648
Kumar B Roy v Secretary of State for India, L R 44 I A 104 : 32 M L J 505 Ref to ... 48, 62
Kumeda Charan Bala v Ashutosh Chattopadhyaya, (1912) 17 C W N 5. ... 486
Kunhacha Umma v Kutti Mammi Haji, (1892) I L R 16 M 201 ; 2 M L J 226 ... 681, 682
Kunhayan v Ithukutti, (1898) I L R 22 M 295 : 9 M L J 1 ... 722
Kunj Behari v Keshavlal Heralal, (1904) ILR 28 Bom 567 at 571. 671, 672 ... 674, 677
Kuppuswamy Aiyangar v Kamalammal, (1920) I L R 43 M 842 39 M L J 375 ... 276
Kuppuswami Aiyar, *In re*, (1915) I L R 39 M 561 : 28 M L J 505 ... 375
Kuppuswami Chettiar v Rajagopala Aiyar, (1921) 42 M L J 303 ... 538
Kuppuswami Goundan v Marimuthu Goundan, (1924) 47 M L J 487. ... 749
Kuyyathil Kandan Kutty v Vyalpath Parkum, (1915) 32 I C 107 ... 582

L

Lachmi Narain Marwari v Balmukund Marwari, (1920) 5 Pat L J 383 ... 300
Lakshmi Achi v Subbaram Aiyar, (1915) I L R 39 M 488 at 493 : 28 M L J 491 ... 371, 372
Lakshmiah v Narayanappa, (1918) 23 M L T 337 ... 510
Laldhari Singh v Manager, Courts of Wards, (1911) 14 C L J 639, 642 ... 434
Lal Gopal Datta Chowdhury v Khorooriah Majozilla Zamindary Syndicate, Ltd, (1911) 13 I C 673 ... 685
Lalit Mohan Singh Roy v Chukkun Lal Roy, (1897) I L R 24 C 834 at 849 ... 588, 589
Lalla Bhagun Pershad v Halloway, (1885) I L R 11 C 393 ... 435
Latham v R Johnson and Nephew, Limited, (1912) 1 K B 398 at 408... 894, 896, 898, 903, 904
Latifa Bi v Mattai Ammal, (1922) I L R 46 M 836 : 44 M L J 271 ... 352, 353, 354
Laurie v Douglas, 15 M and W 746 ... 152
Leake v Robinson, (1817) 2 Mer 363 ... 343
Leather Cloth Co v American Leather Cloth Co., Ltd, 4 De G J and S P 137 ... 73
Ledu Coachman v Hiralal Bose, (1915) I L R 43 C 115 ... 881
Leonards Carrying Co., Ltd v Asiatic Petroleum Co Ltd (1915) A C 785 ... 153
Loke Indar Singh v Rup Singh, (1888) I L R 11 A 118 ... 650
London and Paris Banking Corporation, *In re*, L R 19 Eq Cases 445. ... 710, 713
Lovery v Walker, (1911) A C (H of L) 10 ... 894
Loyland Shipping Co v Norwich Union Fire Insurance Society, (1918) A C 350 ... 153

M

Madan Gopal v Malawa Ram, (1922) 68 I C 777 ... 411
Ma Gun Bon v Maung Po Kywe, 2 U B R 66 ... 855
Mahadeo Lal v Darsan Gope, (1911) 15 C W N 542 ... 721, 723

PAGE

Mahammad Askari v Radha Ram Singh (1900) I L R 22 All 307 : 20 A W N 73 ... 87
Mahammad Rowther v Abdul Rahman Rowther, (1922) I L R 46 M 135 ... 20, 22
Mahammad Umar v Must Man Kuar, (1916) 21 C W N 906 ... 3
Muhammad Usan Rowthan v Abdulla, (1900) I L R 24 M 171 at 174 : 10 M L J 347 ... 604
The Maharaja of Burdwan v Apurba Krishna Roy, (1911) 15 C W N 872 ... 762
Maharajadhiraj Sir Rameshwar Singh Bahadur v Hitendra Singh, (1921) 6 Pat L J 208 ... 286
Mahmud Shah v Talab HussainShah, (1923) 73 I C 915 (A I R) 1924 Lah 245 554
Mahomed Akil v Asadunnisa Bibee and Mutty Lal Sen Gywal v Deshkar Roy, (1867) 9 W R 1 ... 398
Mahomed Azmat Ali Khan v Lalli Begum, (1881) I L R 8 C 422 at 434 ... 649
Mahomed Ibrahim Hussain Khan v Ambila Pershad Singh, (1912) I L R 39 C 527 : 22 M L J 468 (P C) 319
Mahomed Shumsool v Shewallram, (1874) L R 2 : I A 7 at 15 342
Mahomed Silar Sahib v Nabi Khan Sahib, (1916) 31 M L J 93 ... 498, 502
Mahommed Ghouse Cooroosbee v Mustan Ally, (1869) 4 Mad Jurist 127 831
Makrand Singh v Kallu Singh, (1919) I L R 41 All 581 333
Makundi v Sarabsukh, (1884) I L R 6 All 417 : A W N 144 88
Malayandi Goundan v Bomman Poosari, (1922) 17 L W 159 ... 553
Malkarjun v Narhari, (1900) I L R 25 Bom 337 at 347 : 10 M L J 368 (P C) 281, 373
Malli Chettiar v Veerannathevan (1921) 41 M L J 470 912
Mallinson v Mallinson, L R 1 P and M 221 ... 618
Mallireddi Ayyareddi v Adusmili Gopalakrishnayya, (1923) I L R 47 M 190 : 46 M L J 164 (P C) 637
Malukchand v Bechar Natha, (1901) I L R 25 B 639 (F B) ... 538, 539
Manavikraman v Ananthanarayana Iyer, (1924) 46 M L J 250 1924 M W N 38 197
Mancharam Kalliandas v Bakshe Saheb, (1869) 6 B H C R 231 829, 831
Manja v Kadugochen, (1883) I L R 7 M 89 306
Mann v Thompson, (1854) 1 Kay 638 342, 343
Mara v Browne, (1896) 1 Ch 199 206, 209
Marbilla Iron Ore Co. v Allen, 47 L J (C P) 601 831
Mariam Bewa v Merjan Sardae, (1919) I L R 47 C 438 883
Mariappa Pillai v Raman Chettiar, (1918) I L R 42 M 322 ... 916
Marina Veeraswami v Boyinapally Venkataiayudu, (1920) 39 M L J 225 (F B) ... 394, 395, 396
Marshall v Barkworth, (1833) 4 B & Ad 508 497
Maruthai Goundan v Dasappa Goundan, (1916) 31 M L J 375 ... 386, 388
The Master Governors and Trustees of the Bedford Charity, *Re* (1819) 2 Swanston's Chan Reports, 518 366
Mathew v Brise, 14 Beav 345 207
Maung Kyin v Ma Sewe La, (1917) L R 44 I A 284 811
Maung Sein Thwe v Ma Shwe Yi, 10 L B R 397 ... 856
Merchants Trading Co v Universal Marine Co. Lus L J 9 Q B 581 at 596 152

PAGE

Merwanji Nowroji v Ashabai, (1915) I L R 8 Bom 1 ... 829, 831
Midnapore Zamindari Co., Ltd v Naresh Narayan, (1920) L R 48 I A 55 : I L R 48 C 460 (P C) : 47 M L J 23 (P C) 30,488,495,613,733
Mohan Krishna Dar v Har Prasad, (1917) 40 I C 2 274, 276
Monmohini Guha v Banga Chandra Das (1903) I L R 31 C 357 ... 807
Moonshe Amir Ali Khan Bahadur v Kasim Ali Khan, (1870) 13 W R 403 525
Moore v Flanagan, (1920) 1 K B 919 at 921 86, 87
Morel v Earl of Westmoreland, (1903) 1 K B 64 on 76 (Per Collins M R) on Appeal (1904) A C 11 86, 87
Morla Gangulu v Thata Jagannatham, (1923) 45 M L J 724 ... 303, 304
Moulvi Mohamed Shumsool Huda v Shewukram, (1874) 22 W R 409 (P C) ... 589
Moulvie Sayyud Uzhur Ali v Mussammat Bee Ultaf Fatima (1869) 13 M I A 232 ... 628
Mouna Guruswami Naicker v Sheik Mahommadhu Rowther, (1922) I L R 46 M 83 : 43 M L J 713 197
Muddun Gopal v Ram Buksh, (1863) 6 W R 71 ... 267
Mulla Vittil Seethi v Achuthan Nair, (1911) 21 M L J 213 603
Mungul Prasad Dichit v Grija Kant Lahiri, I L R 8 C 51 6
Murari v Tayana (1895) I L R 20 Bom 286 ... 88, 92
Musammat Bibi Walian v Banki Behari Pershad Singh, (1903) L R 30 I A 182 ... 283
Musammat Kollany Kooer v Luchmee Pershad, (1875) 24 W R 395 at 397 ... 588
Mussammat Rashid-un-nisa v Muhammad Ismail Khan, (1909) L R 36 I A 168 : 19 M L J 631 ... 281, 282
Musammat Sasiman Chowdhrani v Sibnarain Chowdhrani, (1917) 1 P L W 375 587, 588
Mussan Haji v Thiyan Thavara Koran, (1921) 41 M L J 392 728
Muthia Chettiar v Bava Saheb, (1914) 27 M L J 605 551
Muthiah Chettiar v Ramanathan Chettiar, (1917) 7 L W 330 ... 847
Muthukrishna Aiyar v Sankaralingam Pillai, (1912) I L R 36 M 229 24 M L J 135 (F B) 607,833,837,838
Muthukumarappa v Arumuga Pillai, (1883) I L R 7 M 145 ... 744
Muthukumarappan Chetty v Muthuramalinga Chetty, (1883) I L R 7 M 47 722
Muthu Karuppa Pillai v Marudachalam Chetti, (1914) 27 I C 436 ... 388
Muthukumaraswamy Nadar v Muhammad Rowther, (1921) 42 M L J 352 439, 440
Muthu Pillai v Vedavyasachariar, (1920) 12 L W 277 612, 614
Muthusubbia Chettiar v Rangia Gowndan, (1897) 7 M L J 191 207
Muthuswami Iyer v Kalyani Ammal, (1916) I L R 40 M 818 ... 344, 345, 346
Muthuswami Aiyar v Nainar Ammal, (1917) 7 L W 194 558, 561
Muthu Veera Vandayan v The Secretary of State for India in Council, (1906) I L R 29 M 461 ... 507, 511
Muthuvelu Mudaliar v Vaithilinga Mudaliar, (1919) I L R 42 M 407 36 M L J 385 386,387,388,811

N

Nadepena Appamma v Chinnavedu, (1923) 45 M L J 667 ... 915
Nagalingam v Ramachandra, (1901) I L R 24 M 429 : 11 M L J 210, 267
Nagi Konda Reddi v Emperor, (1917) I L R 41 M 246. 692

PAGE

Naku Amma v Raghava Menon, (1912) I L R 38 M 79 681
Nanabhai v Achratbai, (1886) I L R 12 Bom 122 267
Nand Ram v Bhopal Singh, (1912) I L R 34 A 592 645
Nand Ram v Bhupat Singh, (1911) I L R 34 All 126 335
Nannhi Jan v Bhuri, (1908) I L R 30 A 321 : 5 A L J 358 15, 16
D. Narasamma v D Kannaya, (1881) I L R 4 M 134 ... 532, 534, 744,
Narasiah v Venkataramiah, (1918) I L R 42 M 59 : 35 M L J 450 705, 707
Narasimma v Mangammal, (1889) I L R 13 Mad 10 ... 401, 407
Narayanakutti Gowndan v Pachammal, (1911) I L R 36 M 426: 22 M L J 364 623, 640
Narayanaswami Reddi v Osuran Reddi, (1901) I L R 25 M 548 885, 886
Narayan Chetty v Suppiah Chetty, (1920) 38 M L J 437 ... 847
Narendra Chandra Mandal v Jogendra Narayan Roy, (1914) 19 C W N 537 ... 274
Narendra Nath Padhari v Bhupendra Narain Roy, (1895) I L R 23 C 374 538, 539
Narottam Raja Ram v Mohanlal Khan Das, (1912) I L R 37 B 289 ... 553
Narsingh Sahai v Sheo Prasad, (1917) I L R 40 All 1 on p 7 ... 411
Nataraja Thambiran v Kailasam Pillai, (1920) I L R 44 M 283 : 39 M L J 98 (P C) 808
Natha Gulab Co. v Shaller and G I P Ry. (1923) 25 Bom L R 599 793
Navajee v Administrator-General of Madras, I L R 38 M 500 ... 528
Nazir Begum v Rao Raghunath Singh, (1919) I L R 41 All 571 : 36 M L J 521 (P C) ... 333, 335, 336
Nicholas v Asphar, (1897) I L R 24 C 216 155, 158
Nidhi Lal v Mazhar Hussain, (1885) I L R 7 A 436 ... 706
Nidhiram Bandopadhya v Sarbessur Biswas, (1909) 14 C W N 439... 604
Nithyanundroy v Abdur Rahim, (1881) I L R 7 Cal 76 39
The Norway, 3 Moo P C N S 245 : 16 E R 92 151
Novion v Freeman, (1889) 15 A C 1 ... 359
Nunna Brahmayya Setti v Chidaraboyina Venkataswamy, (1902) I L R 26 M 214 ... 866, 869, 871
Nunna Setti v Chidaraboyina, (1902) I L R 26 M 214 490

O

The Official Assignee of Madras v Ramachandra Aiyar, (1922) I L R 46 M 54 : 43 M L J 569 490, 492, 493, 749, 751, 752
Oodayanasamy Tevar v Alagappa Chetty, (1903) 14 M L J 342 276

P

Padam Lal v Tek Singh, (1906) I L R 29 A 217 ... 588
Padapa v Swamirao, (1900) I L R 24 Bom 556, 561 : L R 27 I A 86, 90 250
Pakkiri Kanni v Manjoor Saheb (1923) I L R 46 M 844 909
Palaniandi Pillai v Papathi Ammal, (1914) M W N 159 ... 393
Palaniappa Chettiar v Shanmugham Chettiar, (1918) I L R 41 M 815 at 816 : 35 M L J 90 769
Palaniappa v Lakshmanan, (1893) I L R 16 M 429 ... 528
Palaniappa Udayan v Arumuga Pandaram, (1916) 1 M W N 256 : 32 I C 692 550, 551
Palaniyandi Malavarayan v Vadamalai Odayan, (1915) 2 L W 723... 602
Panchu Das v Emperor, (1907) I L R 34 C 698 at 703 ... 223 227, 231
Pande Satdeo Narain v Ramayan Tewari, (1923) I L R 2 Pat 335 ... 277, 278, 280
Panku Menon v Dharman Achan, I L R 41 Mad 488 517

PAGE

Parameswaran Munpee v Narayanan Nambudiri (1916) I L R 40 M 110 : 31 M L J 279 745, 746
Parlmer v W. P. Steam Shipping Co, L R 1894 A C 318 306
Parmeswari Pershad Narayan Singh v Sheo Dutt Rai and Thumak Singh v Sheo Dutt Rai (1907) 6 C L J 448 703
Parsotam v Janki Bai, (1907) I L R 29 All 354 ... 267
Partab Singh v Bhabuti Singh, (1913) L R 40 I A 182 : 25 M L J 492 : (1913) I L R 35 All 487 ... 276, 282
Parthasarathi Aiyangar v Doraiswami Naicker, (1922) I L R 46 M 823 : 44 M L J 91 212, 213, 215, 216, 217, 219, 220
Parthasarathi Pillai v Thiruvengada Pillai, (1907) I L R 30 M 340 17 M L J 379 369
Paru Ammal v Itticheri Amma, (1915) 32 I C 459 682
Pasupulati Achyamma v Pabbamidi Papamma, 2 IC 850 ... 607
Pattatheruvath Pathumma v Mannam Kunnizil Abdulla Haji, (1907) I L R 31 M 228 : 18 M L J 16 681
Payidanna v Lakshminarasamma, (1914) I L R 38 M 1076 536
Pease v Lowden, (1898) 1 Q B D 386 775
Pemberton v Hughes, (1899) 1 Chan 781 ... 360
Performing Right Society, Ltd. v London Theatre of Varieties, Ltd., (1924) A C 1 70, 78
Periyanayagi Ammal v Ratnavelu Mudaliar, (1922) 18 L W 625 ... 344, 345
Periasami v Krishnayyan, (1902) I L R 25 M 431 ; 12 M L J 166 (F B) ... 502
Periyaswami Mudalfar v Seetharama Chettiar, (1903) I L R 27 M 243 at 249 : 14 M L J 84 829, 832
Periaswami Thalavar v Subramania Asari, (1903) 14 M L J 136 ... 833, 837 838
Peria Thiruvadi Aiyangar v Pokutti Janaki, (1923) 45 M L J 693 ... 517, 519
Pertap Chunder Ghose v Mohendranath Purkait, (1889) I L R 17 Cal 291 132
Pichuvayyan v Subbayyan, (1889) I L R 13 M 128 778
Pinto v Badman, (1891) 8 Patent Cases 181 73
Polemisand Furness Withy & Co., *In re* (1921) 3 K B 560 153
Pollard v Rouse, (1910) I L R 33 M 288 ... 621
Ponnammal v Soondara Pillai, (1900) I L R 23 M 499 : 10 M L J 300 39
Ponnayyah v Viranna, (1921) I L R 45 M 425 : 42 M L J 429 702
Ponniah Nadan v Deivani Ammal, (1919) 36 M L J 463 ... 602
Ponnusami Padayachi v Karruppudayan, (1914) 26 M L J 285 415, 419, 426, 427
Ponnuswami Chetty v The Vellore Commercial Bank, Ltd., (1919) 38 M L J 70 847
Porkodi Achi, *In re*, (1921) I L R 45 M 246 : 41 M L J 587 ... 920
Pramatha Nath Basu v Bhuban Mohan Basu, (1921) I L R 49 Cal 45 545
Prasad Row v The Secretary of State for India, (1917) I L R 40 Mad 886 at 897 : 33 M L J 144 (P C) 507, 508, 780, 782
Premsukh Dass v Rambhujawan Mahton, (1919) 1 Pat L T 34 : 52 I C 964 ... 333
President District Board, Tanjore v Kannuswami Thondaman, (1916) 35 I C 121 ... 419, 426, 427
The President, Lincoln, *In re* 1911 P 248 ... 153
Price & Co. v Union Lighterage Co. (1903) 1 K B 750 [On Appeal (1904) 1 K B 413] 153

PAGE

Priestby v Fernie, 3 H & C 977 ... 87
Prosunno Chunder Bhuttacharjee v Kristochytunno Pal, (1878) I L R 4 C 342 832
Punnayya v Viranna, (1921) I L R 45 M 425 at 428 : 42 M L J 429 ... 930

Q

Queen Empress v Bana Punja, (1892) I L R 17 B 760 227, 231
Queen Empress v Bigheswar, (1887) I L R 9 All 645 226, 228
Queen v Gyngall, (1893) 2 Q B D 232 619, 620
Queen v Howes, 3 El and E 332 : (121 E R 467) 617, 618
Queen Empress v Jagan Singh, (1892) 12 A W N 102 376
Queen Empress v Nagasheppa Pai, (1896) I L R 20 Bom 543 ... 376
Queen Empress v Santaram (Ratnalal's unreported criminal cases of the Bombay High Court, page 315) 658, 660
Queen Empress v Thangavelu Chetti, (1898) I L R 22 M 153 356

R

Radhabai v Anantrao, (1885) I L R 9 Bom 198 (F B) 198, 249, 253, 255
Radha Kishan v The Collector of Jaunpur, (1900) I L R 23 A 220 400
Radha Prasad v Ranee Mani, (1908) I L R 35 C 896 (P C) 589
Radha Prosad Singh v Sundar Lal Singh, (1883) I L R 9 C 644 538, 539
Ragunatha Rao v Hanumantha Rao, (1922) I L R 46 M 1 ... 197
Raichand Kirparam v Ranchhoddas Manchharam, (1920) I L R 45 B 174 ... 799
Rai Raghubar Singh v Jai Indra Bahadur Singh, (1919) I L R 42 A 158. 523, 526
Rajagopala Aiyar v Ramanujachariar, (1923) I L R 47 M 288 : 46 M L J 104 536
Rajagopala Aiyar v Sheik Davood Rowther, (1917) 34 M L J 342 ... 436
Rajagopala Naidu v Ramasubramania Aiyar, (1923) 45 M L J 274 (F B) 672, 677
Rajah Hurronath Rai Chowdhri v Rundhir Singh, (1890) I L R 18 C 311 335
Raja of Pathapuram v Secretary of State, 16 M L T 375 at 380 640
Rajah of Ramnad v Velusami Tevar, (1920) 40 M L J 197 (P C) ... 6
Rajah of Venkatagiri v Ayyappa Reddi, (1913) I L R 38 M 738: 25 M L J 578 ... 470
Rajah Venkata Narasimha v Rajah Sureman, (1908) I L R 31 M 321. 401, 407, 408
Raj Chunder Sen v Ganga Das Seal and Romgati Dhur v Raj Chunder Sen, (1904) I L R 31 C 487 (P C) ...873, 874, 876
Rajcoomar Roy v Gobind Chunder Roy, L R 19 I A 140 48, 60
Rajendra v Bhojendra, (1922) 37 C L J 191 ... 909
Ramachadra Aiyar v Parameswaran Unni (1918) I L R 42 M 360 at 368 :36 M L J 396 ... 366, 367
Ramachandra Rao v Ramachandra Rao, (1922) I L R 45 M 320: 43 M L J 78 (P C) ... 726
Ramadoss v Hanumantha Rao, (1911) I L R 36 M 364 : 21 M L J 952. 671, 674, 676, 677
Ramajogayya v Jagannadhan, (1918) I L R 42 M 185 : 36 M L J 29 (F B) 207, 683, 684 768
Ramakka v Nagesana, C M A Nos. 411 and 401 of 1921 ... 730, 734
Ramakrishna Naidu v Krishnaswami Naidu, (1918) 36 M L J 641 : (1918) 9 L W 180 ...612, 613, 744
Ramanadhan Chetti v Murugappa Chetti, (1900) I L R 24 M 45 440
Ramanadhan Sivayya v Udatha Atchayya, (1913) M W N 288 392
Ramanand v Jai Ram, (1920) I L R 43 A 170 829, 832

PAGE

Ramanathan Chettiar v Kalimuthu Pillai, 1912) I L R 37 M 163 : 24 M L J 670 ... 358
Ramanathan Chettiar v Muthiah Chetty, (1919) I L R 43 Mad 429 : 38 M L J 247 205, 206, 209, 210, 211
Ramanathan Chettiar v Subramania Sastrial, (1902) I L R 26 M 179 at 181 761
Ramanāthan Chetty v Subramania Chetty, (1915) 28 M L J 372 847
Ramanathan Chetty v Yegappa Chetti, (1915) 30 M L J 241 ... 555
Raman Nayar v Krishnan Nambudripad, (1922) I L R 45 M 900 : 43 M L J 354 (F B) 553
Rama v Shamrao, (1904) 7 Bom L R 135 ... 253
Ramayya Chettiar v SappanimuthuChettiar, A S No 90 of 1921. 206 207, 208, 209
Ramayya v Krishnamma, (1899) I L R 23 M 114 : 9 M L J 361 388
Ramayya v Krishnamurthi, (1916) I L R 40 M 296 435
Ramayyangar v Krishnayyangar, (1886) I L R 10 M 185 ... 649
Ram Bujhawan Prosad Singh v Nathu Ram, (1922) 44 M L J 615 : 50 I A 14 336
Ramchandra Dhondo Kulkarni v Malkapa Bin Narasapa Devare (1916) I L R 40 B 679 729
Rameshar v Mussammat Rukmin, (1909) 14 P C 244 267
Ram Gopal Roy v Stuart & Co, 14 M I A 453 39
Ramiah Aiyar v Gopalier (1918) I L R 41 M 1053 : 35 M L J 355 523 526
Ram Kirpal Shukul v Mussamat Rup Kuari, (1883) L R 11 I A 37 ... 286, 293
Ramkishore Kedarnath v. Jainarayan Ramrachpal, (1913) I L R 40 C 966 (P C) 467
Ramsbottam v Wallis, 5 L J N S Ch 92 603, 604
Ramtohal v Emperor, (1909) I L R 36 C 385 661
Ram Tuhul Singh v Biseswar Lal Sahoo, (1875) L R 2 I A 131 634
Ranee Birjobuttee v Pertaub Singh, (1860) 8 M I A 160 525
Rangacharlu v Emperor, (1905) I L R 29 M 236 661, 662
Ranganatham Chetty v Lakshmi Ammal, (1913) 25 M L J 379 612 744
Ranga Reddi v King Emperor, (1919) I L R 43 M 450 : 38 MLJ 97 692
Rangaswami Chetty v Thangavelu Chetty, (1919) I L R 42 M 637 ... 7
Rangayya Chetti v Thanikachalla Mudali, (1895) I L R 19 M 74. 490, 866, 869, 871
Rao Girraj Singh v Rani Raghubir Kunwar, (1909) I LR 31 A 429... 485
Rashid-un-nisa v Muhammad Ismail Khan, (1909) I L R 31 All 572... 276
Rati Ram v Niadar, (1919) I L R 41 All 435 ... 393
Ratnasabapathi Pillai v Ramaswami Aiyar, (1910) I L R 33 M 452 20 M L J 301. 671, 672, 673, 675, 676, 677
Rattonbai v Chabildas Lallo Bhoy, (1888) I L R 13 Bom 7 371
Ravi Varma Rajah v Ramasubramania Pattar, (1916) 31 M L J 733... 805
Rayner v Rayner, (1904) 1 Ch 176 844, 848
Reazuddi v The King Emperor, (1912) 16 C W N 1077 ... 223, 228, 238
Reference under S. 39 of the Madras Forests Act, (1889) I L R 12 M 203 (F B) 384
Reg v Clarke, 7 E. & B 186. 618, 619, 620
Rex v Howes, 3 E & E 332 ... 618
Richards v Butcher, 7 Patent Cases, 277 73
Richardson v Methley School Board, (1893) III Ch. 510 204
Riddaway v Banham, (1896) A C 199 73
Roberts v Karr, 1 Taunt 495 (127 E R 926) ... 479, 480
Robert Watson & Co v Ram Chand Dutt, (1889) L R 17 I A 120 at 121. 28, 29

PAGE

Royzuddi Sheik v Kalı Nath Mookerjee, (1906) I L R 33 C 985 636
Run Bahadur Singh v Lucho Koer, (1884) I L R 11 C 301 613
Runchordas Vandrawandas v Pavatibhai, (1899) L R 26 I A 71 367
Rup Narain v Bishwanath Singh, (1922) I L R 44 A 629 919, 921
Rutter v Tregent, (1879) 12 Ch 758 522

S

Sabjan Sahib v Abdul Azeez Sahib, (1916) 42 I C 684 at 689 793
Sadagopa Aiyangar v Sellammal, (1922) 43 M L J 761 434, 435
Sadasiva Pillai v Kalappa Mudaliar, (1900) I L R 24 M 39 ... 450
Saffoon Waldon Second Benefit Building Society v Raynir, (1880) Ch D 406 484, 485
Saguna v Sadashiv, (1902) I L R 26 Bom 710 ... 401, 407, 408
Saithri In re, (1891) I L R 16 Bom 307 621
Sajjad Hossain v Ram Lal Sahu, (1911) 16 I C 159 649
Salem Town Bank, Ltd v Venkatachar, (1910) 9 I C 197 ... 837
Sama Rao v Vannaji Vapuji, (1923) I L R 46 M 64 at 69 ; 43 M L J 745. 491
Sangapally Lakshmayya v Intoory Bolla Reddy, (1902) I L R 26 M 385 : 13 M L J 129 670
Sankaramahalingam Chetti v Muthulakshmi. (1917) 33 M L J 740 ... 20, 22
Sankaranarana Pillai v Rajamani, 46 M L J 314 (1923) I L R 47 M 462. 750, 754
Sankara Venkataratnam v Sri Rajah Varadarajah Appa Rao, (1915) 29 M L J 184 415, 418, 419, 420, 426, 427
Sankunni v Ikkora Kirtti, (1919) M W N 570 ...877, 879, 880
Sanyasi Charan Mandal v Asutosh Ghose, (1914) I L R 42 C 225 491, 862, 867, 868, 871
Sarvothama Rao v Chairman, Municipal Council, Saidapet, (1923) 45 M L J 23 ... 201, 204, 765
Satish Chandra Mukerjee v Ahara Prasad Mukerjee. (1907) I L R 34 C 403 (F B) 516
Scarf v Jardine, 7 A C 345 86, 87
The Secretary of Board of Revenue v Muniswami Chetty & Son, (1923) 45 M L J 711 ... 162
The Secretary of State for India v Ambalavana Pandara Sannadhi, (1917) 33 M L J 415 ... 508, 509
Secretary of State v Assan, (1915) I L R 39 M 727 : 30 M L J 255 (F B) ... 381, 382, 786
Secretary of State for India v Bai Rajbai (1915) 42 I A 229: 29 ML J 242 (P C) ... 574, 577
The Secretary of State for India v Janakiramayya, (1915) 29 M L J 389 at 421 (F B) ... 508, 509
Secretary of State for India v Kamachee Soye Sahiba, (1859) 7 Moo I A 476 574, 578
Secretary of State v Kasturi Reddi, (1902) I L R 26 M 268. ... 39, 507, 511
The Secretary of State for India v The Maharajah of Burdwan, (1921) L R 48 I A 565 : 42 M L J 61 ... 48, 50, 61
Secretary of State for Indira v Manjeshwar Krishnayya, I L R 28 M 257 : 15 M L J 147. ... 35, 38, 41
Secretary of State v Saminatha Koundan, (1911) I L R 37 M 25: 21 M L J 947 744
Secretary of State v Vira Rayan, (1885) I L R 9 M 175 ... 39
Seeni Nadan v Muthuswami Pillai, (1919) I L R 42 M 821 : 37 M L J 284 ... 193, 197, 450

	Page
Sellamuthu Servai, *In re*, (1923) I L R 47 M 87 : 46 M L J 86	490
Sennimalai Goundan v Palani Goundan, (1916) 32 I C 975	409, 410 413
Sen v Oakes, 24 C W N 155	73
Seshachalam Chetty v Rajam Chetty (1898) 8 M L J 203 ...	428, 429
Sethuratnam Iyer v Venkatachala Goundan, (1919) I L R 43 M 567 at 577 : 38 M L J 476 (P C)	601
Sharoof Sahib v Raghunatha Sivaji, (1915) 18 M L T 401	276, 278
Sheik Galim v Sadarjan Bibi, (1915) I L R 43 C 59	436
Sheik Maula Bux v Raghubari Ganjhu, (1918) 3 Pat L J 645	551
Sheik Sajjad Husain v Sakal Rai, (1922) I L R 2 Pat 7	276, 278
Sheik Suleman v Shivram Bhikaji, (1887) I L R 12 B 71	523, 525
Sheo Prasad v Indar Bahadur Singh, (1908) I L R 30 A 179	539
Shib Lakshan Bhakat v Srimati Tarangini Dasi, (1908) 8 C L J 20	588
Shital Prasad v Gaya Prasad, (1914) 19 C L J 529 ...	648
Shivlal Motilal v Bridichand Jivraj, 19 Bom L R 370 following 3 H and C 977	87
Shone v Greenwood, (1920) 2 K B 657 ...	247
Shrinivasdas Bavri v Meherbai, (1916) I L R 41 Bom 300 at 308 (P C) ...	840, 843, 844
Shunmuga Devar v Shunmuga Devar, (1919) 53 I C 203	344, 345
Sichanand Misra v Gajmohan Lal, (1922) 68 I C 707	319
Sinclair v Brougham, (1914) A C 398 ...	704, 707, 708
Singaram Chettiar v Kalyanasundaram Pillai, (1914) 1 L W 687	388
Singer Manufacturing Co v Loog, (1882) 8 A C 15	73
Singleton v Eastern Counties Railway Company, 7 C B N S 287	895
Sir Jamsetji Jijibhai v Sonabai, (1865) 2 Bom H C R 139	793
Sita Ahir v Emperor, (1912) I L R 40 C 168	230
Siva Panda v Jujusti Panda, (1901) I L R 25 M 599 at 602	306
Sivarama Aiyar v Gopalakrishna Chettiar, (1924) 47 M L J 337 ...	669
Sivaramakrishna Pattar v Moideen Musaliar, (1909) I L R 33 M 34 19 M L J 509	476
Smith v Lion Brewery Company, (1911) A C 150 ...	160, 162, 16
Somerville v Schembri, (1889) 12 A C 453	73
Soondarlal v Goor Prasad, (1898) I L R 23 B 414	516
Spalding v Gamage, (1915) 32 Patent Cases 273 ...	73
Sreemati Raghumani Devi v Mukandalal Bandopadhyaya, (1920) 25 C W N 283 ...	319
Sreepada Brahmayya Pantulu v Parasuram Ayya, (1902) 12 M L J 348 ...	7
Sreepati Charan Chowdhary v Shamaldhone Dutt, (1910) 15 C L J 123 ...	5
Srinivasa Aiyangar v Ramaswami Chettiar, (1915) I L R 39 M 235 : 29 M L J 12 (F B)	882
Srinivasa v Dandayudapani, (1889) I L R 12 M 411 ...	340
Srinivasaraghava Aiyangar v Ranganatha Aiyangar, (1918) 36 M L J 618 ...	639
Sri Sri Sri Chandra Deo v Srinivasacharlu, (1913) I L R 38 M 235 25 M L J 433	635
Steiurnan Co v Angler Line, (1891) 1 Q B 619	153
Stiefsohn v Brookebond Co., 5 Tim L R 684	903, 906
Stileman v Ashdown, (1742) 26 E R 688	431, 432
Subal Chandra v Mosaraf Ali, (1917) 38 I C 476	649

PAGE

Subba Aiyar v Ramaswami Aiyangar, (1920) 40 M L J 209 ... 750, 753, 754
Subbachariar v Muthuveeran Pillai, (1912) I L R 36 M 553 : 24 M L J 545 608, 610
Subbarayadu v Ramadasu, (1921) I L R 45 M 872 : 42 M L J 301 237
Subbaraya Mudaliar v Rakkhi, (1908) I L R 32 M 140 450
Subbayya v Rachayya, (1914) I L R 37 M 477 ... 196
Subbiah Naicker v Ramanathan Chettiar, (1914) I L R 37 M 462 : 26 M L J 189 193, 196, 197, 270, 271, 449, 450
Subramania Chettiar v Alagappa Chettiar, (1906) I L R 30 M 268 ... 608, 610
Sudalaimuthu Kudumban v Andi Reddiar, (1922) I L R 45 M 628 : 42 M L J 484 413
Sudarsana Rao v Christian Pillai, (1923) 45 M L J 798 ... 774
Sudhir Chandra Das v Gobinda Chandra Roy, (1917) I L R 45 C 538. 767
Sukhi v Ghulam Sabdar Khan, (1921) I L R 43 All 469 : 42 M L J 15 (P C) 320
Sukkulal Sowcar v A V Tirumal Rao Sahib, (1918) 51 I C 295 ... 837
Sultan Moideen v Savalayammal, (1892) I L R 15 M 343 : 2 M L J 50 ... 502
Sundarambal Ammal v Yogavanagurukkal, (1914) I L R 38 M 850 at 853 : 26 M L J 315 807
Sundara Reddiar v Subbiah Koundan, (1912) 24 M L J 28 322
Sundar Singh v Nigahiya, (1922) 72 I C 410 644
Sunder Koer v Rai Sham Krishen, (1906) I L R 34 C 150 911, 912
Sunderland, *In re* (1911) 2 K B 658 497
Suppa Reddiar v Avudai Ammal, (1904) I L R 28 M 50 (F B) 609
Suraj Bansi Koer v Sheo Prasad Singh L R 6 I A 88 ... 864
Suryanarayana v Patanna, (1918) I L R 41 M 1012 : 36 M L J 585 (P C) ... 560
Swaminadha Aiyar v Govindaswami Padayachi, (1918) I L R 41 M 733 : 34 M L J 536 (F B) 668, 669
Swaminatha Mudaliar v Gopalakrishna Naidu, (1915) 30 I C 144 439, 440
Swan Brewery Case, 1914 A C 231 ... 244
Syed Muhamad Rowther v Somasundaram Chettiar, (1920) 12 L W 710 428, 429

T

Tappenden v Rundall, (1801) 2 B and P 467 880, 881
Tara Chand v Reeb Ram, (1866) 3 B H C R 50 267
Tassaduq Hussain v Hayat-un-nissa, (1903) I L R 25 A 280 644
Taylor v Bowers, 1 Q B D 291 ... 881
Taylor v Plumer, 105 E R 721 : 3 M & S 562 ... 704, 707, 708
Taylor's case, (1922) 1 A C (H of L) p 44 903, 904
Tetley *Ex parte* Jeffery, *Re* (1896) 75 L T 166 433
Thackaria v Pura Singh, (1922) 67 I C 589 376
Thaikkottathil Kunheen, *In re* (1923) 18 L W 946 ... 223, 225, 228
Thakur Prasad v Fakir Ullah, (1894) I L R 17 A 106 : 5 M L J 3 (P C) ... 270, 271, 882
Thakur Tajeswar Dutt v Lakhan Prasad Singh, (1922) I L R 2 Pat 296 275
Thayammalachi v Sevu Rajali, (1911) 2 M W N 327 607
Thimma Reddi v Subba Reddiar, (1918) M W N 507 502
Thomas Pillai v Muthuraman Chettiar, (1909) I L R 33 M 205 431, 432

	Page
Thompson v Davenport, 9 B & C 78	87
Thorp v Holdsworth, (1868) 3 Ch D 837	521
The Thrunscol, (1897) P 301 at 304	152
Tildesley v Harper, (1871) 7 Ch 403	522
Tirumala Reddy, *In re* 30 M L T 348	232, 235
Trevor and Witworth, (1887) 12 A C 409	245
Trimble v Hill, 5 A C 342 ...	880
Tuljaram Row v Alagappa Chettier, (1910) I L R 35 M 1 at 17 21 M L J 1 (F B) ...	934
Tulsidas Lallubhai v The Bharat Khand Cotton Mill Company, Ltd., (1914) I L R 39 B 47 ...	710, 713
Tweddle v Atkinson, (1861) 1 B and S 393 ...	517, 518, 519

U

Umapati Samanta v Sheikh Masietulla, (1922) 37 C L J 496 ...	276
Usher's Wiltshire Brewery Company, Ltd v Bruce, (1915) AC 433 ...	160, 162, 163
Uttam Chandra Daw v Rajkrishna Dalal, (1919) I L R 47 C 377 (F B)	800
Uzir Ali Sardar v Savai Behara, (1916) I L R 43 C 938	553

V

Vaithianatha Aiyar v Tyagaraja Aiyar, (1919) 41 M L J 20 ...	363
Vaithianathaswami Iyer v Somasundaram Pillai, (1904) I L R 28 M 473	435
Vajechand v Nandram, (1907) I L R 31 Bom 545 ...	194
Varamma v Gopaladasayya, (1917) I L R 41 Mad 659 : 35 M L J 57 (F B) ...	545, 547, 548
Vasudevan v The Secretary of State for India, (1888) I L R 11 M 157,	688
Vedachala Mudaliar v Subramania Mudaliar, (1921) 48 I A 360 : 41 M L J 676 ...	401, 407
Vedanayaga Mudaliar v Vedammal, (1904) I L R 27 M 591 14 M L J 297	401, 405
Vedavalli Narasiah v Mangamma, (1903) I L R 27 M 538	450
Veeraraghava Iyer v Lakshmana Iyer, (1912) 23 M L J 312	635
Veeraraghava v Ramalinga, (1885) I L R 9 M 148 (F B)	778
Veera Reddi v Subbanna Reddi, (1910) 8 M L T 387	911
Velayudham Pillai v Perumal Naicker, (1915) 2 L W 1210	88
Vembu Iyer v Srinivasa Iyengar, (1911) 23 M L J 638 at 641	207
Vemuri v Seshanna, (1902) I L R 26 M 421	356
Venkanna Patrudu, *In re* (1915) 18 M L T 591 ...	886
Venkatachalam Chettiar v Veerannan Ambalagaran, (1912) M W N 512 ...	911
Venkatachellamayya v Nilakanta Girjee, (1917) I L R 41 M 474 . 34 M L J 156 (F B) ...	637
Venkatanarayana Pillai v Subbammal, (1915) I L R 38 Mad 406 : 28 M L J 535 (P C) ...	545, 546
Venkatanarayan v Subbammal, (1915) L R 42 I A 125 at 129 : 28 M L J 535 ...	824, 827
Venkatarama Iyer v Esumsa Rowthen, (1909) I L R 33 M 429 ; 20 M L J 330 ...	705
Venkataramanachari v Thirunarayanachari, (1914) 2 L W 212	88

PAGE

Venkatarama Sivan v Secretary of State for India, (1918) 36 M L J 203 ... 786
Venkataramiah Pillai v Subramania Pillai, (1916) 37 I C 799 ... 911, 912
Venkatarangayya Appa Row Bahadur v Marampudi Bajiraju, 45 M L J 238 ... 558, 561
Venkatarao v Sastha Iyer, (1914) 2 L W 255 ... 197
Venkatasami Naicker v Muthusawmi Pillai, (1917) 34 M L J 177 ... 768
Venkatasubbiah v Venkateswarlu, (1917) M W N 816 ... 393
Venkatasuryanarayana v Sivasankara Narayana, (1917) 17 M L T 85, 86 ... 744
Venkayamma v Narasamma, (1916) I L R 40 M 540 : 31 M L J 33 ... 343, 344
Veyindramuthu Pillai v Maya Nadan, (1919) I L R 43 M 107 38 M L J 32 (F B) ... 722
Vidya Varuthi v Balusami Aiyar, (1921) I L R 44 M 831 : 41 M L J 346 (P C) ... 220, 258
Vijiaraghavalu Naidu v Srinivasalu Naidu, (1905) I L R 28 M 399 ... 538, 539
Vira Kumara Servai v Gopalu Servai, Sp A 3 of 1861 cited at p 1066 of West and Buhler's Hindu Law 3rd Ed. ... 777
Vishnu Nambudri v Akkamma, (1910) I L R 34 M 496; 20 M L J 938. ... 688
Viswanadha Reddi v Keymer, (1914) I L R 39 M 95 : 27 M L J 670 ... 358
Vittappa Kuda v Durgamma, (1919) 38 M L J 190 ... 307, 309
Von Hatzfeldt Wildenburg v Alexandar, L R (1912) 1 Ch 284 ... 570
Vydianatha Aiyar v Govinda Odayar, (1921) 42 M L J 551 ... 833, 837, 838
Vythilinga Padayachi v Ponnuswami Padayachi, (1920) 41 M L J 78. ... 749, 754
Vythilinga v Vijayathammal, (1882) I L R 6 M 43 ... 777

W

Waghela Rajsanji v Shekh Maludin (1887) I L R 11 B 551 (P C) ... 207
Wahan v Banki Behari Pershad Singh, (1903) I L R 30 Cal 1021 ... 277, 278
Wallace Sitha Bai v Wallace Radha Bai, (1918) 36 M L J 182 ... 655, 656
Ward & Co. Ltd. v Commissioner of Taxes, (1923) A C 145 ... 162
Watkins v Frederick, 11 H L J 358 ... 341, 669
Watson & Co. v Sham Lal Mitter, (1887) I L R 15 C 8 ... 88, 91
Watts v Driscoll, (1901) 1 Ch 294 ... 556
Watts v Kelson, (1871) 6 Ch A 166 ... 304
Webb v Macpherson, (1903) I L R 31 C 57 : 13 M L J 389 (P C) ... 740
Wiles v Gresham, 43 E R 1069 : 24 L J Ch 264 ... 805
Williams v Currie, (1845) 135 E R 774 ... 923, 924
Williams v Jones, 13 M & W 628 at 633 ... 831

X

The Xantho, 12 A C 503 ... 151

Y

Yelikapalli Venkayya v Venkataramayya Appa Rao, (1917) 33 M L J 757 ... 415, 418, 420, 426, 427
Young v Hughes, 4 H & N 76 at 83 & 84 ... 353
Yusuf Sahib v Durgi, (1907) I L R 30 M 447 : 17 M L J 260 ... 744

Z

Zamindar of Ettiyapuram v Chidambaram Chetty, (1920) I L R 43 M 675 : 39 M L J 203 (F B) ... 192, 193, 198, 452, 459

THE

Madras Law Journal Reports.

PART I.] JULY 1924 • [VOL. XLVII.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Offg C. J.* AND MR. JUSTICE KUMARASWAMI SASTRI.

Chintalapalli Sesha Sastrulu and another *Appellants** *(Defendants).*

v.

Korivi Venkamma *alias* Kidambi Venkamma *Respondent* *(Plaintiff)*

Sesha Sastrulu *v.* Venkamma

Hindu Law—Gift—Widowed daughter-in-law—Gift by father-in-law—Life-estate conferred—Remarriage of widow—Effect on gift—Hindu Widows' Remarriage Act, S. 2.

A Hindu father-in-law made a gift of immoveable property to his widowed daughter-in-law to be enjoyed by her during her lifetime. Subsequently the widow remarried and claimed the property gifted to her. The claim was resisted on the ground that by remarriage her interest in the property had ceased. *Held,* that the widow took a life-estate in the property and there was nothing in the gift-deed to limit her enjoyment of the property to such period as she remained unmarried ; that as the property gifted by the widow's father-in-law was not obtained by her in the manner referred to in S. 2 of the Hindu Widows' Remarriage Act (XV of 1856), her interest therein did not cease on remarriage under that Act ; and that the plaintiff was therefore entitled to a decree for possession of the property.

Appeal against the decree of the Court of the Subordinate Judge of Bellary dated 9th December, 1920, in O. S. No. 10 of 1920 on its file (O. S. No. 12 of 1919 on the file of the District Court, Bellary).

S. T. Srinivasagopalachari and *V. S. Govindachari* for appellants

C. Sambasiva Rao for respondent.

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*Appeal No. 158 of 1921. 23rd January, 1924.

Sesha Sastrulu v. Venkamma.

Spencer, O. C. J

The Judgment of the Court was delivered by

The Officiating Chief Justice :—This is a suit brought by a daughter against her parents for recovery of certain properties which she alleged were left in her parents' possession when she left their house. The plaintiff married her own uncle, Sankariah, who died in 1908. In 1908, her father-in-law K. Subbiah, who was also her grandfather, made a gift in her favour of certain properties to be enjoyed during her lifetime. In September, 1917, after she became a widow, she ran away to Rajahmundry to the Widow's Home of Rao Bahadur M. R. Ry, Viresalingam Pantulu and got married to her second husband K. Singaracharlu. As her parents retained her property after her re-marriage she gave them a Lawyer's notice, to which they replied denying that they had any Stridhanam property belonging to her, and she thereupon filed this suit.

The Subordinate Judge's decree is attacked on the ground that it has not been satisfactorily proved that she left the jewels which she now claims in her parents' possession, that as regards the clothes, she did not specifically mention them in her plaint, and, as regards the immoveable property, that the gift must have been made with an implied intention that, upon remarriage, the property should revert to the family. The Subordinate Judge has given the plaintiff a decree for certain of the jewels which he has found to have been left in the defendant's possession and has disallowed her claim for certain other jewels. On the whole, there is no good reason for disturbing his finding as to the jewels. Some doubt has arisen in respect of her claim for a gold kante of weight 18 Tolas and value Rs. 540. In her plaint, the plaintiff alleged that all the jewels claimed in Schedule A had been left in the possession of the defendants. It came out in her evidence that she gave a pair of Kappulu and thodulu to her father to be made into a kante and that he had not given her the kante which he promised. Her mother was examined as defence 9th witness and she denied that her daughter left any jewels and said that she took away the jewels with her when she ran away. She said on the contrary that she saw the kappulu and golusulu in her possession at the Ranichatram where she met her daughter after her remarriage. There is very little independent evidence on this subject. A witness was examined to say that she was not wearing these jewels when she arrived at Rajahmundry, and the photographs taken after her remarriage are also evidence of this fact that she did not wear them after she reached Rajah-

mundry. Her father, defence tenth witness, denied that his daughter left any jewels with him or his wife. He was not asked specifically whether he took any jewels to make a kante, but it is not likely that he would have admitted it after having in chief-examination denied that any jewels were left with him. That is all the evidence. D. W. 9 says that her daughter went away with her jewels. The photographs show that she was not wearing the kappulu and thodulu after her remarriage. On the whole, there is no reason to disallow her claim for the value of the kante of 18 tolas, which corresponds in weight to the kapulu and thodulu, that she says she gave to her father.

As regards the clothing she enumerated the cloths that she claimed in the schedule to the plaint. No evidence was adduced to prove their value, but her mother, as D. W. 9 said that the cloths given her at her first wedding had become worn out by use. There is no evidence that she left behind cloths of so much value as Rs. 240 as claimed in the plaint. We disallow this item.

As regards the immoveable property, S. 2 of Act XV of 1856, (the Hindu Widow's Re-marriage Act), provides that, upon re-marriage all rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance, or by will or testamentary disposition, shall cease and determine upon her re-marriage. But the immoveable property concerned in this case was gifted to her by her father-in-law and was not obtained in the manner referred to in this section. We have been asked to interpret the gift deed (Ex. C.) as implying that the property was given to her for her use during her widowhood. There is no reason why, when the document states that the donee is to enjoy during her life time, we should limit the enjoyment to such part of her life as she remained unmarried, when there are no words to that effect. As re-marriage of widows is an exceptional event, it is not likely that the donor would have contemplated his daughter-in-law re-marrying. The case of *Mahammad Umar* v. *Must. Man Kuar* (1) was a case, not of gift, but of an agreement for the settlement of family difference in which the learned Judges were inclined to presume that there was no intention that the plaintiff should have a right of residence in a certain house belonging to her deceased husband if and when she became remarried. The inference that was drawn in that

1. (1916) 21 C W N 906.

Sesha Sastrulu v. Venkamma.

Spencer, O. C. J.

case as to the intention of the parties to that particular document is not of much assistance to us in interpreting the present gift deed which contains no words to suggest that the life interest of the plaintiff was to be limited on the happening of any future event.

The lower Court's decree will, therefore, be confirmed in respect of the amount decreed therein for jewels and as regards the order for delivery of possession of the immoveable properties and for account of rents and profits, but deducting Rs. 240 on account of cloths from the amount decreed in respect of moveable properties. The parties will pay and receive proportionate costs throughout, including the costs, of printing.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—I agree with my Lord and I have nothing more to add.

A. V. V

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Kalepalli Rajitagiripathy *Appellant** (*1st Respondent*)

v.

Kalepalli Bhavani Sankaran and another *Respondents* (*Petitioner and 2nd Respondent*).

Rajitagiripathy v. Bhavani Sankaran.

Civil Procedure Code, S. 11, *Expl. IV—Execution proceedings—Application for transfer of decree—Notice to judgment-debtor—Limitation—Failure to plead—Effect of—Application for recognition of transferee from decree-holder—If a step-in-aid of execution—Limitation Act, Art.* 182 (5)—*Attachment of decree before judgment—Injunction—Period if can be excluded—Limitation Act, S.* 15.

Where the assignee of a decree applies to the Court to transmit the decree to another Court for execution and the judgment-debtor though served with notice fails to appear and plead that the decree could not be executed as being barred, S. 11, Expl. IV will apply and the question would be *res judicata* in subsequent execution proceedings. I L R 8 C 51 ; 40 M L J 197 (P C) foll. Even in an application for transfer of a decree, it is open to the judgment-debtor to plead limitation and he ought to do so.

An application by a transferee decree-holder for a recognition of his transfer and to execute the decree is a step-in-aid of execution and saves limitation. 12 M L J 348 followed.

An attachment before judgment of a decree and a consequent order issued by the Court attaching the decree by absolutely prohibiting the execution of the decree by anybody amounts to an injunction and the period of its pendency can be excluded under S. 15 of the Limitation Act in executing the decree.

Appeal against the order of the District Court of Kistna at Masulipatam in E. P. No. 60 of 1922 (O. S. No. 66 of

*A A O No. 60 of 1923. 22nd February, 1924.

1913 on the file of the Court of the Temporary Subordinate Judge of Masulipatam.)

T. Ramachandra Rao and *N. Mangapathi Naidu* for appellants.

P. Somasundaram and *P. Satyanarayana* for respondents.

The Court delivered the following

JUDGMENT :—This appeal relates to the execution of a decree dated 27—3—1918. On 26—7—1919 the transferee decree-holders applied for recognition of their transfer and for execution. However, in consequence of an attachment of the decree, this petition was dismissed. The next petition was put in on 4—4—1922 asking for the transmission of the decree to the District Court for execution, and on 26—4—1922 the present execution petition was filed. It was contended that the present petition was barred by limitation, but four grounds were urged by the decree-holder for allowing execution. The District Judge has held that two of these grounds were valid and has ordered execution to proceed. Now, this appeal is filed by the first defendant, the judgment-debtor.

The first ground taken is that the plea of limitation is *res judicata* by reason of the order on the application of 4—4—1922 directing the transmission of the decree to the District Court. It has been held in the Calcutta Court in *Sreepati Charan Chowdhary* v. *Shamaldhone Dutt* (1) and in *Chutterput Singh* v. *Rai Bahadur Soomarimull* (2) that, when an order for transmission of the decree is made, no question of limitation is decided and therefore such an order does not amount to *res judicata* on the question of limitation. In fact, in the former case, Mukerjee, J., held that the judgment-debtor could not at that stage possibly contend that the decree was barred by limitation: but, apparently no notice was issued to the judgment-debtor under S. 248 of the Code of Civil Procedure the Court held further that, even though notice under S. 248 is issued, it is not competent for a judgment-debtor at that stage to contend that the decree ought not to be transferred because an application for execution thereof is likely to prove infructuous as being barred by limitation. In the judgment no authority is given for this proposition of law and possibly it is based upon the rules of the Calcutta High Court, which do not require the issue of a notice to the judgment-debtor in an application for transmission of the decree. On the other hand,

1. (1910) 15 C L J 123. 2. (1916) 20 C W N 889.

Rajitagiri-pathy v. Bhavani Sankaran

in Madras, under R. 161 (3) of the Civil Rules of Practice, a notice should be issued, and a notice was accordingly issued in this case. It is now argued for the respondent that the judgment-debtor had an opportunity of appearing and pleading that the application was barred by limitation, and it would seem that, when there was that opportunity, S. II, Expl. IV would be applicable and that the question would be *res judicata* because it was one which might and ought to have been put forward to show that the decree was not one that could be executed. In fact in *Mungul Prasad Dichit* v. *Grija Kant Lahiri* (3) it was held that, where an execution petition was barred by limitation but execution had been ordered to proceed, it was not open to the judgment-debtor in a subsequent application to plead that the former application was barred by limitation. Similarly in *Rajah of Ramnad* v. *Velusami Tevar* (4) the Privy Council held that, when an assignee of a decree applied to be brought on the record and to have the decree executed, execution was allowed although the judgment-debtor had raised the plea that execution was barred by limitation. In the order allowing execution the plea of limitation was not dealt with specifically but it was held that in a subsequent application the plea of limitation could not be urged, for it must be deemed to have been decided in the order on the former application. In that case the plea was raised in the first proceedings but their Lordships remark in the judgment (at page 200), "It was not only competent to the present respondents to bring the plea forward on that occasion but it was incumbent on them to do so if they proposed to rely on it. No appeal was brought from the order then made and therefore it was not competent for the Subordinate Judge to admit the plea on the subsequent proceedings." It would appear from this that, even in an application for transfer of a decree, it is open to a judgment-debtor to plead limitation and in fact he ought to do so. If the decree is barred by limitation, the transfer of it to another Court is a mere infructuous proceeding which ought not to be taken and, therefore, if a valid plea of limitation is available, it should be urged in order to prevent multiplicity of proceedings. In this view we think that the District Judge's order in the present case was correct.

The second ground on which the District Judge allowed execution is that the petition put in on 26—7—1919 was a step in aid of execution, and, being less than three years before the

3. I L R 8 C 51. 4. (1920) 40 M L J 197 (P C)

Rajitagiripathy, v. Bhavani Sankaran.

present application, the latter is not barred. The application of 26—7—1919 was one put in by the transferee decree-holders to recognise the transfer and to execute the decree in certain methods specified in the petition. The petition was dismissed because execution of the decree had been stayed and it appears that in subsequent proceedings the right of those transferee decree-holders has been negatived. At the time the application was made they were transferee decree-holders by assignment from the original decree-holders and as such the proper persons to execute the decree ; it was held in *Sreepada Brahmayya Pantulu* v. *Parasuram Ayya* (5) that such an application as this would have the effect of saving the bar of limitation. The transfer in that case was effected by a decree of Court whereas in the present case the transfer is effected by an assignment by the parties, but this cannot affect the question whether the application was one made in accordance with law. Until the assignment had been held to be invalid, the transferees were the persons who had title to execute the decree. On this ground also we think the District Judge was right.

The District Judge has rejected the third ground, namely, that, limitation is saved under S. 15 of the Limitation Act, and he has based his decision on *Rangaswami Chetty* v. *Thangavelu Chetty* (6). In that case, however, the attachment was of a book-debt and it is clear that an attachment of a book-debt does not operate as an injunction within the meaning of S. 15 of the Limitation Act. When a decree is attached, the form of attachment is given in Appendix E, forms Nos. 22 and 23, and, in accordance with those forms, there would not really be any injunction against execution, for the attaching decree-holder can execute the decree himself ; but, in the present case, the attachment was not by a decree-holder, but it was an attachment before judgment, and consequently the order issued by the Court attaching the decree absolutely prohibited the execution of the decree by anybody, as will be seen by a reference to the attachment order. This order clearly amounts to an injunction and it is not denied that, if the period during which that injunction was in force be deducted, the present application would be within time.

For all these reasons we think that the present petition is not barred by limitation and therefore dismiss this Appeal with costs.

T. S. V. ——— *Appeal dismissed.*

5. (1902) 12 M L J 348. 6. (1919) I L R 42 M 637.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Ayyaswami Iyer and others *Petitioners* (Accused Nos. 1 to 5).*

v.

Annan Thirumala Iyer *Respondent (Complainant).*

Ayyaswami Iyer, *v.* Thirumala Iyer.

Penal Code, S. 499, Exception 9—Defamation—Sectarian disputes—Excommunication of a member of a community—Publication in the course of duty—Good faith.

The accused were the executive members of a caste association known as the Sourashtra Sabha. On a representation made to the Sabha that the complainant, one of the members of the community subject to the jurisdiction of the Sabha, was liable to be excommunicated for a caste offence, notice was given to him to appear and answer the charge and on his refusal to do so, an order of excommunication was passed against him. A report was drawn up of the Sabha's proceedings and was published by the caste head (one of the accused) in accordance with the usual practice, to the heads of the community in order places. The accused were charged with defamation. It was found that according to the usual procedure of the Sabha in question and other similar institutions, a delinquent who refused to attend and answer the charge against him was liable to be excommunicated without further enquiry. *Held* (1) that the accused having followed the usual procedure of the Sabha in the proceedings taken by them against the complainant, could not be said to have been actuated by malice, however defective that procedure might appear to more judicial minds ; (2) that the accused were acting in good faith and in the interests of their community ; (3) that the publication of the report was made in the usual course of the accused's duty to those who had a right by virtue of their caste position to be acquainted with the matter in question ; and (4) that the accused were fully protected by the ninth exception to S. 499 of the Indian Penal Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions, Salem, in Criminal Appeal No. 9 of 1923 (C. C. No. 137 of 1922 on the file of the Court of the Sub-Divisional 1st Class Magistrate of Salem).

Nugent Grant, Counsel and *N. C. Vijayaraghavachariar* for the Petitioners.

K. P. M. Menon, Counsel and *Salem Ramaswami Iyer* for the Respondent.

The Court made the following

ORDER :—The petitioners have been convicted of defamation. It was found and petitioners did not deny, that they,

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*Cr R C No. 420 of 1923
(Cr R P No. 322 of 1923). 7th February, 1924.

Ayyaswami Iyer *v.* Thirumala Iyer.

as executive members of the Shevapet Sowrashtra Sabha, communicated to other local Sabhas reports of the nature of Ex. A, filed in this case, in which it is stated that a complaint had been received that one K. Narasimha Iyer said that Anan Thirumalai Iyer—P. W. 1, had been born to Putta Venkata Subbayya, and that he, while an infant, was rolled up in a mat and thrown ; that the sabha met accused and under their orders a servant was sent to bring P. W. 1, and on his report that P. W. 1 could not come, they considered the matter and decided that P. W. 1 should be removed from the community, and that that had accordingly been done.

The lower Courts have found that this report was defamatory of P. W. 1 and was not privileged. It is argued in revision that the lower appellate Court has based its confirming Judgment on mistakes of fact and that both Courts had fundamentally erred in their conception of what would constitute malice in law.

There have been for some time two rival Sourashtra Sabhas in Shevapet, the accuseds' Sabha having seceded from the local Shevapet Sabha, because it would not conform to the ruling of the main assembly allowing the reinstatement in caste of a member who had gone to England and returned. The accused upheld the ruling of the main assembly. The original Sabha headed by P. Ws. 2 and 3 refuse to recognise it. Since the secession, evidently, each branch has claimed to be the proper caste tribunal for Shevapet. In December 1920, the accuseds' Sabha excommunicated P. W. 1 as set out in Ex. A. In April 1921, the rival Sabha excommunicated accused 1, 3 4 and 5. By Ex. IV on 14—8—1922, P. W. 2 and others of his Sabha communicated the excommunication of accused 1, 3, 4 and 5 to the very same parties to whom Ex. A was sent. Ex. A was sent to these parties on 4—9—1922.

There was no suggestion that Ex. A had been concocted for the occasion and that it was not true that P. W. 1 was excommunicated in December 1920. The lower appellate Court has therefore erred in supposing that P. W. 1's excommunication was retaliatory measure for the excommunication of accused 1, 3, 4 and 5 by P. W. 2's Sabha since it was three or four months anterior in date. This erroneous view has, to my mind, considerably influenced the lower appellate Court, which proceeded on the idea that the excommunication of P. W. 1 was an act of retaliation and revenge and, therefore, likely to have been due to malice. It then proceeded to put

Ayyaswami Iyer v Thirumala Iyer.

forward other grounds, insufficient to my mind, in themselves to support that finding.

There is no finding that Ex. A does not truly set out the facts, *i. e.,* that it is not true that such a complaint was made to the accuseds' Sabha, or that the Sabha had sent for P. W. 1 or that P. W. 1 was removed in consequence by the accused's community. Nor is there any clear finding that P. W. 1 was not at the time subject to the spiritual discipline of the accuseds' Sabha. The lower appellate Court thinks that the accused had not proved the latter point, but I do not find that P. W. 1 even challenged it. Certainly in his evidence there is no statement that he was not subject to their control. On the other hand, he says that "in those days K. Narasimha Iyer (P. W. 3) was in one Sabha and I was in the other Sabha." A Criminal Court should certainly not assume against an accused person anything which has not been made the subject of proof. The lower Courts seem to me to have further confused the issue by taking Ex. A to mean that the Sabha found that the charge was true and therefore circulated as true a libel which is probably false. But that is not what Ex. A says. It merely mentions the nature of the charge, that P. W. 1 refused to turn up to defend himself and therefore was excommunicated. There is no statement in Ex. A to the effect that the charge was true.

I proceed then on the footing that the statements in Ex. A are true and that P. W. 1 was under the jurisdiction of the accuseds' Sabha at the time of his excommunication and at the time of the publication of Ex. A. The lower appellate Court having taken, as shown above, an erroneous view of the facts proceeded to find malice, on the ground, first that if P. W. 3 made the charge alleged he did not mean it literally, secondly that the complaint to the Sabha was not made by the party who made the charge but by one who merely overheard it, and thirdly that the Sabha had no evidence before it for holding that the charge was true. None of these grounds seem to be substantial and clearly rest on the mistaken idea that the Sabha had held that the charge was proved. It is suggested further by the counter-petitioners, that no notice giving the substances of the charges was sent to P. W. 1 and that no enquiry was held, but I find no justification for such a suggestion. This point had never been so far gone into and it may be noted that

Ayyaswami Iyer v. Thirumala Iyer.

P. W. 1 has not stated that he did not know the nature of the charge.

The Sabha then had before them a serious charge of which I must in the absence of evidence to the contrary presume in favour of the accused that, the delinquent had notice, that it has sent for him to explain and he failed to appear. The prosecution witnesses themselves admit that in such cases, it is the usual practice for Sabhas to excommunicate without further delay or enquiry. P. W. 1 says : " If a member refuses to attend as per the summons of the Sabha, he will be put out of the Sabha. " P. W. 2 similarly says, " If any one is called by the Sabha to answer a charge and if he refused to attend, he will be excommunicated, " and Ex. IV, the document communicating the excommunication of accused 1, 3, 4 and 5 to the other Sabhas sent by P. W. 2 gives several instances of excommunication simply on the ground that the parties summoned to appear before the Sabha had refused to do so. Three of those relate to accused 3, 4 and 5 themselves. P. W. 2 in fact admits that accused 3 and 4 were excommunicated simply because they did not appear. The evidence of P. Ws. 6 and 7 is to the same effect. The accused therefore, so far as appears were merely following the usual procedure and it is difficult to conclude that, by merely doing so, they must have been actuated by malice, however defective that procedure might appear to more judicial minds. The Sabha must be found to have fallen short of their own standard of justice before malice could be imputed to them, and, in this case, I judge the accused Sabha by the standard of justice they themselves get from the Sabha of P. W. 2. As to the allegation that no enquiry was held assuming that it be true, such enquiry, as I have shown above is not the usual procedure when a delinquent does not turn up after notice. As to whether notice was actually sent there is no clear finding that it was not. P. W. 1 says he got no notice, but the lower Courts did not accept his statement ; and assumed that the accused's version that P. W. 1 got the notice was true. I am not prepared to assume against the accused that the notice was not sent.

It is urged further by the counter-petitioners that the long delay in publishing the fact of excommunication and the fact that it was published a few days after the publication of the

Ayyaswami Iyer v. Thirumala Iyer.

accused's excommunication by P. W. 2's Sabha justify the inference of malice. But it is obvious that such long delays are also usual The excommunication of the accused was not published until 16 months after it occurred. Ex. A was published 21 months after the excommunication. I am not prepared to infer malice from the mere fact of delay. That such a publication by the caste-head was the proper and the recognised procedure is obvious from Ex. IV itself, which publishes the accused's excommunication by P. W. 2's Sabha to the very same persons, and in the very same manner as Ex. A does. It hardly lies in the mounth of P. W. 2's party to which P. W. 1 now belongs to argue that such publication is not the usual procedure or that the delay in the publication is any evidence of want of good faith.

The facts then are that the accused as the head of the Sabha, to which P. W. 1 was then subordinate, received notice of the charge against him which he, after due notice given, made no attempt to meet, that they then, according to the usual procedure when an accused party fails to appear to answer to a charge, passed an order of excommunication, and that then they in accordance with the usual procedure imparted that fact to the heads of the community in other places in the usual form containing a brief and accurate statement of what had occurred. There is no suggestion of any publication to any persons who had not a right by virtue of their caste position to know of the fact.

It has been suggested that I should send the case for findings on the various points on which findings ought to have been recorded, such as, whether a proper enquiry was held and whether Sabha had authority over P. W. 1; but I can see no object to be served by fomenting any more this internecine quarrel. On their own showing, P. W. 1's party has done almost exactly the same thing in the matter of excommunicating the accused and publishing the fact, I am not prepared to send the case back.

It is impossible then to support the lower Court's conclusion that the accused circulated the libel as a charge enquired into and proved. On the other hand there is no evidence from which to conclude that the accused circulated the charge knowing it to be false, they circulated it in the ordinary routine procedure, according to which, even if the charge was false, P. W 1 would be liable to excommunication for mere refusal

Ayyaswami Iyer v. Thirumala Iyer.

to attend. I find therefore that the publication complained of was made in the course of the usual routine procedure in such matters, that the usual procedure was followed regarding the enquiry into the charge itself, and that the accuseds' Sabha, to which P. W. 1 then owed allegiance, were bound on P. W. 1's own showing to communicate the fact to the other sabhas of the community. P. W. 1 says, " If any one be excommunicated from one sabha the matter will be communicated to sabhas in other places " and again, " Either after inquiry or if the persons against whom information is laid, absent themselves from the Sabha after being sent for, we used to communicate the complaint and the decision of the sabha to the other sabhas."

It appears to me that the publication in this case was in the usual course of accuseds' duty, that there is nothing to show that the accused were not acting in good faith in the interests of their community and that the publication is therefore protected by the ninth exception to section 499 of the Indian Penal Code. I am of opinion that the convictions therefore cannot be supported. The convictions and the sentences are therefore reversed and the fines, if paid will be refunded to the petitioners.

A. V. V *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Ramappa Chettiar and another *Petitioners* (Plaintiffs-Respondents.)*

v.

Ekambara Padayachi *Respondent (Claim-petitioner)*

Ramappa Chettiar v. Ekambara Padayachi.

Civil Procedure Code O. 21 Rr. 58, 63—Claim petition—Dismissal for default—Court's power to restore—If affected by O. 21 R. 63.

Where a claim petition preferred under O. 21 R. 58 is dismissed on account of the non-appearance of the claimant, the Court has power to restore it to the file. O. 21 R. 63 does not take away the right of the party to have the order of dismissal for default set aside.

Petitions under S. 25 of Act IX of 1887, praying the High Court to revise the orders of the Court of the Small Causes at Kumbakonam in I. A. Nos. 1245 and 1246 of 1922 in S. C. S. No. 3060 of 1922.

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*C R P Nos. 843 and 844 of 1922. 26th February, 1924.

Ramappa Chettiar v. Ekambara Padayachi

K. S. Jayarama Iyer for petitioner.
K. S. Desikan for respondent.

The Court delivered the following

JUDGMENT :—A claim was preferred under O. 21, R. 58 C. P. Code and it was dismissed on account of the non-appearance of the claimant. On his application the Subordinate Judge restored the petition. The present revision petitions have been filed challenging the correctness of this order.

O. 21, R. 63 provides that the party against whom an order is made may institute a suit, but subject to the result of such suit the order shall be conclusive. It is said that the words "*the order shall be conclusive*" have the effect of precluding an application of this kind being entertained. No authority bearing directly on the point has been cited and I am not prepared to accede to this contention. If the legislature had intended to lay down such a rule I should have expected to find very clear language employed to indicate that intention. The words in my opinion do not take away the right of the party to have the order of dismissal for default set aside. Full effect can be given to the words "the order shall be conclusive" by holding that an adjudication finally made after the setting aside of the dismissal, is conclusive subject to the result of the suit mentioned in the rule.

The revision petitions are accordingly dismissed with costs, half of the vakil's fee in the first and half in the second is allowed.

T. S. V. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Modadugu Perayya *Appellant* (Defendant).*

v.

Peroli Venkayamma *Respondent (Plaintiff).*

Perayya v. Venkayamma

Civil Procedure Code, O. 21, R. 63—Suit by defeated claimant to establish title—Benami sale—Burden of proof.

Ordinarily it will be for the party who sets up that a particular transaction is not real but *benami* to make out affirmatively the case put forward by him.

*S. A. No. 66 of 1921. 23rd January, 1924.

But where the ostensible owner has been defeated in a claim proceeding and sues to set aside the order made on the claim petition under O. 21, R. 63, Civil Procedure Code, the onus is on him to establish that he is the real owner of the property and it is not sufficient for him to rely merely upon the deed which shows his ostensible title.

Jamahar v. *Askaran*, 22 C L J 27 ; *Govind Atmaram* v. *Santai*, 12 B 270 ; *Nannhi Jan* v. *Bhuri*, 30 A 321 referred to.

Second Appeal against the decree of the Court of the 2nd Additional Subordinate Judge of Guntur in A. S. No. 24 of 1920 (A. S. No. 81 of 1920 on the file of the District Court) preferred against the decree of the Court of the Principal District Munsif, Bapatla in O. S. No. 1017 of 1918.

V. Ramadoss for appellant.

K. S. Ganapathi Iyer for respondent.

The Court delivered the following

JUDGMENTS :—The plaintiff is the wife of one Narayana Rao, against whom the defendant obtained a decree. In execution proceedings, the plaintiff intervened with a claim alleging that the property attached was not her husband's but her absolute property. The claim having been dismissed, the plaintiff has filed this regular suit, which the District Munsif has dismissed on the ground that the sale in favour of the plaintiff was *benami* for her husband. On appeal the Subordinate Judge has reversed the finding of the District Munsif. He in effect has held that the plaintiff is not merely the ostensible but also the real owner of the property but unfortunately he has thrown the onus wrongly upon the defendant, and this is what he observes on the point " The burden was on the defendant to establish that Ex. A which stands in plaintiff's name was *benami* for her husband, and, in my opinion, it was not discharged at all. " Ordinarily it will be for the party who sets up that a particular transaction is not real but *benami* to make out affirmatively the case put forward by him. But it has been pointed out in the decisions to which my attention has been drawn that, after the dismissal of a claim, where a regular suit is instituted to set aside the order made on the claim petition, it is for the plaintiff in that suit, *i. e.*, the defeated claimant to establish that he is the owner of the property, and that it is not sufficient for him to merely rely upon the deed which shows his ostensible title [see *Jamahar* v. *Askaran* (1) ; *Govind Atmaram* v. *Santai* (2) ; and *Nannhi*

1. (1915) 22 C L J 27. 2. (1887) I L R 12 B 270.

Perayya v. Venkayamma

Jan v. *Bhuri* (3)]. It is quite possible that, if the Subordinate Judge had considered the evidence without applying the rule of evidence which he has, he might still have come to the same conclusion after consideration of the probabilities and the documentary and oral evidence in the case. He, however, having considered the evidence from a wrong standpoint, his decision must be reversed. I accordingly set aside the decision of the lower appellate Court and remand the appeal for fresh disposal.

In the circumstances I direct that the costs of this appeal do abide the result of the suit. Refund of the Court-fees paid for this appeal is ordered.

A. V V. *Order set aside*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Kanniappa Mudali and others *Appellants* (Appellant No. 1 is the 9th defendant and appellants Nos. 2 and 3 are the L. Rs. of the 10th defendant)*

v.

P. V. Raju Chettiar and others .*Respondents (Respondents Nos. 1 to 3 are the plaintiffs and respondents Nos 4 to 11 are defendants Nos. 1 to 8 respectively).*

Kanniappa Mudali v. Raju Chettiar

Provincial Insolvency Act (III of 1907), Ss. 16 (5), 31—Insolvency of mortgagor—Sale by Official Receiver free of incumbrances—No actual consent by mortgagees—Application to set aside sale dismissed—Suit to enforce mortgage—Maintainability.

On a mortgagor becoming insolvent, his properties vested in the Official Receiver, and he gave notice to all the mortgagees that he proposed to sell the properties free of incumbrances giving them the same charge on the sale proceeds, as they had on the properties. He called upon them to consent to it and added that if he did not hear to the contrary within a certain time, he would take it that they consented. No reply was received and the properties were sold. The mortgagees then applied to have the sale set aside on the ground that no notice was served upon them, that they did not consent to the sale, and

3. (1908) I L R 30 A 321 : 5 A L J 358.

Respondent 1—3. 9th January, 1924.

also of inadequacy of price. The petition was dismissed as out of time, whereupon they brought a suit for recovering the amount due under the bond. *Held*, the sale was not binding on the mortgagees and the suit was maintainable.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in O. S. No. 34 of 1918.

A. Krishnaswami Aiyar and *B. C. Seshachela Aiyar* for appellants.

A. Visvanatha Aiyar for respondents.

The Judgment of the Court was delivered by

Ramesam, J.

RAMESAM, J. :—In this case the 9th defendant and the legal representatives of the 10th defendant are the appellants. Respondents 1 to 3 are the plaintiffs. The suit was brought for recovery of the principal and interest due on a mortgage bond executed by the husband of the second defendant and defendants 1 and 6. The defence was that the plaintiffs were not entitled to maintain the suit on account of certain proceedings in Insolvency.

The further facts necessary to be stated for understanding this defence are that the sixth defendant became insolvent and his properties were vested in the Official Receiver, Chittoor. On the 16th August, 1915, the Official Receiver gave a notice to the mortgagees in which he stated that he proposed to sell the properties of the insolvent by public auction free from their mortgage with the same charge to them on the sale-proceeds as they might have on the properties, and called upon them to consent to the proposal. He added that, in case they did not intimate to the contrary before a certain date, he would take it that they had consented to the above proposal. Incidentally it may be mentioned that the original notice is not exhibited in the case and all that has been exhibited is an office copy. This office copy contains blanks in all important places where dates and amounts have to be mentioned, in particular the date before which a reply was expected is not in the document and is also a blank. This notice was received as appears from the acknowledgment Ex. I (*a*) on the 26th August, 1915; but there was no reply by the mortgagees to the notice. The Official Receiver proclaimed the sale of the properties and the proclamation is dated the 16th December, 1915. It was signed by the Official Receiver as Official Receiver and was issued from his office. It mentions that the entire right of the insolvent was intended to be sold and also mentions that

*Appeal No. 51 of 1921 and Memorandum of objections in the said Appeal put in by Respondents 1—3.

Kanniappa Mudali
v.
Raju Chettiar
——
Ramesam, J.

the property was to be sold free from encumbrances ; and this particular mortgage was intended to be mentioned there but was described incorrectly, but we do not think that very much turns on the incorrectness of the description of the mortgage. The property was then purchased by defendants 9 and 10, who are now represented by the appellants. On the 22nd February, 1916, the mortgagees, applied to the District Judge for cancellation of the sale on the ground that the notice was not served upon them, that the price realised was not adequate, that the sale was held at a time when there was plague prevailing, and the petition also implies that they did not consent to the sale. The matter came up to the High Court and it was held that the petition was out of time and the petition was dismissed on that ground. The mortgagees then brought the present suit.

On these facts it is contended by the appellants that the present suit does not lie, that the former sale is binding on the mortgagees. Under the Provincial Insolvency Act III of 1907, only the property of the insolvent vests in the Official Receiver. The Act contains no provisions for selling the whole property free from all encumbrances even with the consent of the mortgagees. S. 16 (5) says, that "nothing in the section shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed. S. 31 contains some provisions according to which a secured creditor may after realising his security prove for the balance, or he may relinquish his security and prove for the whole of his debt like any other unsecured creditor, or he may prove for the difference between his debt and the estimated value of the property where the estimated value is less than that of his debt. Here, it cannot be said that the mortgagees have relinquished their security. Therefore none of the provisions of S. 31 applies. It cannot be said that the Official Receiver was a person with certain limited powers and the silence of the mortgagees in not replying to the notice amounted to such a consent as would justify the receiver to sell the properties. Mr. Krishnaswami Iyer, the learned Vakil for the appellants, then argued that, apart from any limited powers under the Act, the Official Receiver at least stands in the position of a mortgagor, and any mortgagor can sell the mortgaged property with the consent of the mortgagees. But it seems to us that a sale by mortgagor without a

relinquishment by the mortgagee but merely with the consent of the mortgagee expressed in an unregistered document cannot be valid unless the facts amount to an authorisation of the mortgagor to sell on the mortgagee's behalf or to an agreement by the mortgagee to accept such sum as may be realised in the sale in discharge of his debt. In the present case, it is very difficult to make all these implications on account of the mere silence of the mortgagees, when they received the notice Ex. I. There is no doubt that the Official Receiver and the purchasers thought that the Official Receiver was authorised to sell under the Act and had limited powers of sale. I find it difficult to accept the contention for the appellants that the plaintiffs are estopped by the proceedings in insolvency. Nor can it be said that the plaintiffs chose one remedy, namely of applying to set aside the sale in the insolvency jurisdiction and that, therefore, they are precluded from their legitimate remedy. They chose the wrong remedy and they never got a relief. They never got any relief when they applied in the Insolvency Court.

We think that the judgment of the Court below is right and that this appeal must be dismissed with costs of respondents 1 to 3.

Now, as regards the memorandum of objections. The learned Subordinate Judge has committed a clerical error in paragraph 22 of his judgment where the figure ought to be Rs. 2,500 instead of Rs. 2,800. The amount due to the plaintiffs will be amended accordingly.

With reference to the interest, the judgment is right, but the decree directs that it should be calculated at 6 per cent. from the date of the decree. This should be altered into "at the contract rate up to the date fixed for payment and 6 per cent. thereafter."

Clause 3 of the decree will also be deleted as the purchasers will be liable for costs personally and for the balance of any unrealised debt the plaintiffs-respondents can prove in insolvency.

The respondents 1 to 3 will be entitled to the costs of the memorandum of objections.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice.*

Mohamed Esuf Rowther *Appellant** (*Deft.*)

v.

Sultan Abdul Kadir and others *Respondents* (*Plaintiffs.*)

Mohamed Esuf Rowther v. Sultan Abdul Kadir.

C. P. Code S. 11—Constructive res judicata—*Suit for partition by one brother against another—Dismissal of—Second suit by heirs of sister against brothers for share of inheritance—Dismissal on the ground that property belonged exclusively to plaintiff in first suit—Suit by heirs of plaintiff in first suit for possession —Partition —Amendment of plaint.*

One S. a Mohamadan, sued his brother E. for possession of certain lands alleging a trespass by the latter. The suit was dismissed on the defendant taking oath. The daughters of a deceased sister of S and E sued them both for a share in the lands but the suit was dismissed on the finding that they belonged exclusively to S. Subsequently on the death of S. his heirs brought the present suit against E. to recover their share in the lands alleging that E. had wrongfully claimed the properties as exclusively his own in the prior suit. The lower Courts gave a decree to the plaintiffs for partition of the properties. On second appeal, *held* that the suit was not one for partition of property between co-owners ; that the decision in the prior suit instituted by S. was *res judicata* against the present plaintiffs and debarred them from asserting exclusive title to the suit properties and treating E. as a trespasser ; that in the prior suit by S. he ought to have asserted his title to a portion of the suit lands and claimed possession thereof in the alternative, and he having omitted to do so, his heirs, the present plaintiffs were precluded from claiming possession of a portion of the lands ; and that the decision in the suit by the heirs of the sisters of S. and E. wherein they were both co-defendants, to the effect that the lands in question were the exclusive properties of S. did not operate as *res judicata* in the present suit.

Muhammad Rowther v. *Abdul Rahman Rowther* (1922) I. L. R. 46 M. 135 ; *Sankaramahalingam Chetti* v. *Muthulakshmi* (1917) 33 M. L. J. 740 Relied on.

Second Appeal against the decree of the Court of the 2nd Additional Subordinate Judge of Tanjore in Appeal Suit No. 99 of 1920 preferred against the decree of the Court of the District Munsif of Negapatam in O. S. No. 502 of 1918.

K. V Krishnaswami Iyer and *N. Swaminatha Iyer* for appellant.

A. Krishnaswami Iyer for respondents.

The Court delivered the following

JUDGMENT :—This is a suit to recover possession of certain lands. The parties are Muhammadans. It is necessary to make this clear at the outset, because in dealing with the

*S A No. 940 of 1921. 11h January, 1924.

Mohamed Esuf Rowther v. Sultan Abdul Kadir

parties' contentions in the Courts below, there has been some confusion of mind caused by reference to self-acquired property and even to stridhanam (see paragraph 27 of the District Munsiff's Judgment in O. S. No. 38 of 1915).

The plaintiffs are the widow and children of Sheik Muhammad Bava Rowther. Sheik Muhammad Rowther had one brother, who is the 1st defendant, and four sisters. There has been previous litigation on the subject of the suit property. Sheik Muhammad Rowther brought a suit O. S. No. 15 of 1905, to recover the same lands from the 1st defendant on a plea of trespass in which he alleged that the properties were in plaintiffs' possession but that it was necessary to have them delivered to him through Court to avoid any further dispute. The defendant took oath in that case and the plaintiff's suit was dismissed. Another suit O. S. No. 38 of 1915, was brought by the daughters of Isabibi Ammal, one of the sisters of Sheik Muhammad, and the 1st defendant. That suit was dismissed on a finding that the property was the exclusive property of Sheik Muhammad.

Both the Courts below have held that the result of the second suit was to negative the right of the sisters of any share of the property and to enhance the shares of Sheik Muhammad and the first defendant. The plaintiffs have been given a preliminary decree for partition of the suit properties into two equal shares. I am of opinion that both the judgments are wrong. This suit does not purport to be a suit for partition of property between co-owners. The cause of action is stated to be the claim of the 1st defendant in O. S. No. 38 of 1915 to absolute right in the suit property, and the relief asked for is that the plaintiffs' 6|8ths share should be made over to them. It is not alleged that the plaintiffs have obtained possession of the property at any date subsequent to the 10th of November, 1905 when the 1st suit (O. S. No. 15 of 1905) for possession of this property was dismissed and that they have since been dispossessed. As regards the plaintiffs' title to sole possession of the property, the decision in O. S. No. 15 of 1905 is *res judicata* as between them and the defendant Muhammed Esuf. The mere assertion of title in O. S. No. 38 of 1915 by a co-defendant will not give rise to any cause of action if the property was at that time in the defendant's possession. The present suit, if it be regarded as a suit to obtain possession against a trespasser, is barred by reason of the prior suit, O. S. No. 15

Mohamed Esuf Rowther v. Sultan Abdul Kadir.

of 1905 upon the same title—[vide *Muhammad Rowther* v. *Abdul Rahman Rowther* (1).] If it to be alleged that in the prior litigation the plaintiff asked for too much and therefore his suit was dismissed and that his representatives are now at least entitled to 6|8ths or some other smaller share of the property, then they are equally barred, because Sheik Muhammad should have pleaded in that suit that, if he was not entitled to a decree for the whole property, he should at least be given a decree for his 6|8ths share. That principle is clearly established by the decision just quoted.

It is argued that the effect of the judgment in O. S. No. 15 of 1905 was destroyed by the judgment in the subsequent suit, O. S. No. 38 of 1915, in which it was held that the property was the exclusive property of Sheik Muhammad. That is not so. The Judgment in O. S. No. 38 of 1915, disposed of a claim made by the daughters of one of Sheik Muhammad's sisters to their share of this property upon partition. The finding that it was the exclusive property of Sheik Muhammad will not operate as *res judicata* between co-defendants, as there was no active contest between them on this point and the decision of the question was not necessary in order to dispose of the suit of those plaintiffs—vide *Sankaramahalingham Chetti* v. *Muthulakshmi* (2). If the present suit is to be treated as a suit for partition of Sheik Muhammad's share, then it is necessary that the plaint should be amended by properly stating the cause of action as the plaintiffs' demand for a partition to be made by their co-owner and his refusal. It will also be necessary to make all the members of the family parties to the suit. One of the sisters of Isa Bivi, Jaleika Bivi, is stated to be dead. The other two sisters Hamida Bivi and Muhammad Bivi are parties in the connected suit for recovery of the house, O. S. No. 511 of 1918 but they have not been made parties to the present suit ; nor has any one been put on the record as the legal representative of the deceased sister. The only order that I can make on the present second appeal is that upon the plaintiffs paying all the costs of the defendants up to date within one month, they will be allowed to amend their plaint so as to claim the relief of partition of their share making all the children of Muhammad Bava or their legal representatives parties to the suit within one month of this order, and upon their so doing, the suit will be remanded for retrial permitting

1. (1922) I L R 46 M 135. 2. (1917) 33 M L J 740.

the defendants to file fresh written statements to meet the plaintiffs' new claim for partition ; and upon the plaintiffs' failure to do so, their suit will stand dismissed with costs in this Court and in the Courts below reversing the decisions of the District Munsiff and the Subordinate Judge. This order also disposes of the memorandum of objections which is dismissed.

Mohamed Esuf Rowther v. Sultan Abdul Kadir.

A. V. V.

PRIVY COUNCIL.*

PRESENT :—LORD ATKINSON, LORD SHAW, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

(On Appeal from the High Court of Judicature at Fort William, Bengal.)

The Midnapur Zamindary Company, Ltd. *Appellants**

v.

Kumar Naresh Narayan Roy and others *Respondents.*

P. C. — Midnapur Zamindary Co., Ltd. v. Kumar Naresh Narayan Roy.

Co-sharers—Enjoyment of common property —Mode of —Exclusive user by one—Rights of others in case of—No ouster by such user—Partition—Remedy of, when open to co-sharer—Decree against co-sharer in exclusive possession—Mesne Profits—Compensation—Decree for —Propriety—Jote rights in lands held in common—Co-sharer if can obtain, as against his co-sharers—Co-sharer if can create such right by letting lands (common) to cultivators—Purchase of jote rights by co-sharer in common lands—Effect—Bengal Tenancy Act, 1885—S. 180—Chur land —Occupancy right in—Acquisition by raiyat—Conditions—Res Judicata—Issue unnecessary—Finding on, if and when res judicata—Party insisting upon decision on issue—Decision of Court in pursuance of—Decree not expressly embodying finding—Effect—Co-sharers—Decree for possession obtained by one co-sharer against another, with a declaration against jote right claimed by defendant —Possession given under S. 264 of C. P. C. of 1882 in execution of—Fresh suit by plaintiff for possession with declaration against jote right claimed by defendant—Limitation—Starting point—Limitation Act Art. 142.

Where lands in India are held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husband-like manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-

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*P. C. Appeal No. 87 of 1923 Dated 7th April 1924.
Bengal Appeal No. 8 of 1921.

P. C.

Midnapur Zamindary Co., Ltd. *v.* Kumar Naresh Narayan Roy.

sharers in the lands. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. No co-sharer can, as against his co-sharers obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them. A purchase by a co-sharer of *jote* rights in lands held in common by the co-sharers will in law be held to be a purchase for the benefit of all the co-sharers, and the jote rights so purchased will by the purchase be extinguished.

In Bengal a co-sharer has no more power to confer a right of occupancy on a raiyat than a middleman would have and in Bengal a middleman cannot obtain as a middleman a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman.

In a suit by the plaintiff for the partition of certain lands in which he and the defendants were co-sharers, the Courts below gave a decree to the plaintiff for partition and for mesne profits. Their Lordships varied the decree of the Courts below by substituting for their order as to mesne profits an order that the defendants were to pay compensation to the plaintiff for the exclusive use by the defendants, themselves or by their tenants of the suit lands until partition was effected and the plaintiff's share delivered to him.

A raiyat cannot acquire under S. 180 of the Bengal Tenancy Act, 1885, a right of occupancy in chur land until he has held the land for twelve continuous years.

A suit for khas possession of certain land was resisted on the ground, *inter alia,* that as the defendants had jotedari right in the land the plaintiff was in any event not entitled to recover khas possession. The plaintiff's pleader made a statement that a decision as to the jotedari right of the defendants was unnecessary, but the defendant's pleader stated it was. The Court acting on the statement of the plaintiff's pleader held that a decision on that question was unnecessary, but it nevertheless decreed possession to the plaintiff. The defendants appealed against that decree, urging that possession ought not to have been decreed to the plaintiff without a decision on the jotedari right set up by them and insisting upon a decision of that question. The appellate Court went into the question, found against the defendants on the same, and affirmed the decree for possession under appeal. The decree drawn up in appeal did not however, make express mention of the decision on that point in terms.

Held that, whether or not the decision of the point was necessary, the defendants having insisted upon the decision of that point by the appellate court and that court having decided the same against the defendants, the issue as to the jotedari right claimed by the defendants was *res judicata* against them.

The decree, though it did not expressly refer to the jotedari, right, must be deemed to have given effect to the finding in the judgment.

Plaintiff and Watson & Co., were co-sharers of certain lands. Watson and Co., having denied the right of the plaintiff as a co-sharer, he sued for and obtained a decree for possession of the suit lands, the decree in effect declaring that Watson & Co., had no jotedari right in the suit lands. A commissioner was appointed to deliver possession to the decree-holder, and he delivered possession under S. 264 of C. P. C. of 1882,

P. C.

Midnapur Zamindary Co, Ltd. v. Kumar Naresh Narayan Roy.

In a suit by the plaintiff against the successors in interest of Watson & Co., for a declaration that the defendants had no jote rights in the lands of which he obtained possession under the prior decree and for a decree for possession after partition by ejectment of the defendants, *held* that the possession which the plaintiff got in execution of the prior decree was a possession of the lands in his proprietary right as a co-sharer and that the subsequent suit, which had been instituted within 12 years of his so obtaining possession, was not barred under Art. 142 of the Limitation Act.

Appeal from a decree of the High Court (17th January, 1921), which affirmed a decree of the Subordinate Judge of Nadia (19th August, 1915) decreeing the plaintiff's claim with costs.

The plaintiff (Appellant) was the Zamindar of the Putia Raj. In 1891 his mother and two other persons brought a suit (No. 6 of 1891) in the Court of the Subordinate Judge of Nadia against Robert Watson & Co., predecessors in interest of the Midnapur Zamindari Company (hereinafter referred to as " the Company ") for a declaration of their right to a settlement of a newly-formed *chur-land* in the bed of the Pabma river (Towzi No. 3514) as re-formation in the wasted-away site of and partly as accretion of their estate (Towzi No. 814 of the Nadia Collectorate). The Subordinate Judge, passed a decree in the plaintiff's favour declaring them entitled to " have a settlement made with them of 12 annas, 6 gundas, 2 cowris and 2 krants share of the Mahal Bhabanandadiar Towzi No. 814," and ordering that they do recover possession of 3998 bighas, 1 cottah, 5 1|2 chattaks of land, comprising the 16 annas of mouzahs Ramkrishnapur, Poilberia, and an 8 annas share of Mouzahs Khaertola, Baliadoba, Chainpara Majdiar, and Kolidiar comprising 12,439 bighas 9 cottas 10 chattaks of land." The appeal to the High Court of Watson and Co. (who contended that they had a *jote* right to the lands and that the question had been left open and not decided by the Subordinate Judge) was dismissed, and the decision of the Subordinate Judge was confirmed on the 30th May, 1900 with a finding that they had no such rights. On the 26th July 1902 and 20th June 1903 a Commissioner appointed by the Court delivered possession under S. 264 of the Civil Procedure Code 1882 in execution of the decree to the decree-holders. The owners of the Putia Raj estate accepted under protest certain summary settlements and executed *Kabuliats*. The two estates (Towzi No. 814 and Towzi No. 3514) were ultimately amalgamated, and when their survey was taken up in 1909 for a

P. C.

Midnapur Zamindary Co., Ltd. v. Kumar Naresh Narayan Roy.

fresh settlement, the Manager of the plaintiff's estate filed an objection to the recording of the *jote* right of the Company (which had acquired the rights of Watson & Co.) in the lands of Towzi No. 3514. The Assistant Settlement Officer upheld the plaintiff's objection, and on the 7th August, 1909 ordered that the Company's alleged *jote* rights should not be recorded, but on appeal, the Collector of Nadia (J. S. Ezechiel, Esq.) on the 20th September 1909, directed that the Company be recorded as *Jotedar*. After the conclusion of the settlement, a *Kabuliat* was executed by the Company and the plaintiff and other members of the Putia Raj on the 9th February 1912 for a term expiring on the 31st March, 1920. The plaintiff filed a petition stating that he did not waive his right to question the order made by the Collector of Nadia as to Watson & Co.'s alleged *jote* rights, and on the 8th August, 1912 instituted the present suit (No. 557 of 1912) in the Court of the Subordinate Judge of Nadia, praying for (1) a declaration that the Company had no such *jote* as claimed (2) partition (3) a decree giving him *Khas* possession of his share, viz., 5 annas, 10 gundas, 2 kannas 2 krants in all lands of Towzi No. 814 with which the lands of Towzi No. 3514 were amalgamated : (4) mesne profits. The plaintiff made his co-sharer Defendant in the action for the purpose of partition, and also the Secretary of State for India in Council a party with a view to obviating any eventual objections as to want of parties. The Company were the only Defendants that contested the suit, and, in their written Statement of Defence filed the 28th November 1912 pleaded that (1) they were entitled to occupancy or *jote* rights in the lands in suit (2) The plaintiff was barred by the Settlement of 1904 and the Collector's order of the 20th September, 1909, and a suit to set aside that order was barred by limitation (3) the decree of the 30th March, 1900 aforesaid did not constitute the question of *jote-rights res judicata* against the Company : (4) the Company and their predecessors Watson & Co., had been in possession for upwards of 12 years of the land in suit under *jote* right, and the plaintiff's claim for *khas* possession was therefore barred by limitation (5) the Company had acquired *jote* rights by adverse possession of limited interest in respect of the whole of the lands of Towzis Nos. 814 and 3514 : thus the plaintiff was only entitled to rent thereof from the Company, who had acquired settled *raiyati* right to the whole of the lands specified according to the partitions of the Bengal Tenancy Act, 1885, S. 20 ; (6) the said

P. C.

Midnapur Zamindary Co., Ltd. v. Kumar Naresh Narayan Roy.

rights had been recorded by Government and had been recognised in the various Settlements of the *Mahal,* (7) the plaintiff had not effectively dispossessed the Company and entered into possession of the lands, and his cause of action was barred by Art. 142 of the First Schedule to the Limitation Act (IX of 1908).

On the 19th August, 1915, the Subordinate Judge (K. K. Sarkar, Esq.) after trial, passed a decree substantially as prayed in the plaint. This decree was confirmed on appeal by the High Court (Woodroffe and Walmsley, JJ.) on the 17th January 1921. The Company thereupon appealed to His Majesty in Council.

De Gruyther, K. C. and Kenworthy Brown for the appellants.

Wallach for first respondent.

7th April 1924. The Judgment of the Board was delivered by

Sir John Edge.

Sir John Edge :—This is an appeal by the defendants, The Midnapur Zamindary Company, Limited, which will be hereafter referred to as The Midnapur Company, against a decree, dated the 17th January, 1921, of the High Court at Calcutta, which affirmed a decree, dated the 19th August, 1915, of the Subordinate Judge of Nadia, by which the claim of the plaintiff, Kumar Naresh Narayan Roy, in Suit No. 557 of 1912, had been decreed with costs. The other parties to the litigation are Rani Hemanta Kumari Debi and the Secretary of State for India in Council, who are defendants and respondents, but they have not appeared and are not represented in this appeal.

The suit in which this appeal has arisen was brought in the Court of the Subordinate Judge of Nadia on the 8th August, 1912, by the plaintiff, who is of the Putia Raj family, and who claimed a decree for the partition of certain lands in which he and the Midnapur Company were co-sharers, a declaration that the Midnapur Company had no *jote* rights in any of the lands of which he sought partition, and a decree for possession after partition by ejectment of the Midnapur Company, and other reliefs.

By the written statement of the Midnapur Company it was denied that the plaintiff was entitled to a decree for partition. The right of the plaintiff to a decree for partition is not now disputed. Partition is the remedy which a co-owner has if

P. C.

Midnapur Zamindary Co., Ltd. v. Kumar Naresh Narayan Roy.

Sir John Edge.

he and the other co-owners cannot agree as to how the lands which they hold in common should be managed. See *Robert Watson and Co.* v. *Ram Chand Dutt* (1).

There were two, and, in the opinion of their Lordships, only two, substantial defences, if proved, put forward by the Midnapur Company to the plaintiff's suit. The first of these defences was that the plaintiff had not been in possession within twelve years of the 8th August, 1912, of the lands in question in which he alleged that the Midnapur Company had no jote rights, and, consequently, that his claim to eject the Midnapur Company from those lands was barred by the limitation of Article 142 of the First Schedule to the Indian Limitation Act, 1908. The other substantial defence, if made out, was that the Midnapur Company held *jote* rights in the lands in question. These two defences their Lordships will consider later. There were two other matters which were put forward by the Midnapur Company in the assertion of their claim to *jote* rights in the lands in question. One of them was an order which was made on 20th September, 1909, by Mr. Ezekiel, the Collector, that the Midnapur Company should be recorded in the settlement papers as tenants with rights of occupancy. That order applied to the lands now in question and was not appealed from. It was made in the course of a new settlement from year to year. The other matter to which their Lordships allude was the contention that the plaintiff was estopped from challenging the right of the Midnapur Company to *jote* rights by a *kabuliyat* of the 9th February, 1912, to which he was a party, and by which the plaintiff had undertaken to respect the recorded rights of raiyats and others. These latter two defences were carefully considered by the High Court in its judgment in this suit, and their Lordships agree with the High Court that they do not afford defences to the claim of the plaintiff.

The evidence as to the rights of the parties was carefully considered by the Subordinate Judge who tried the suit, and the High Court agreed with him in all material matters. The history of the lands in question, which are *chur* lands in the alluvial plains of the river Pabma, and of how those lands have from time to time been dealt with by the Government, by the plaintiff, and by the Midnapur Company and their predecessors in title, including Robert Watson and Co., has, so far as is

1. (1889) L R 17 I A 110 : 18 C. 10 (P. C.)

P. C.

Midnapur Zamindary Co., Ltd. v. Kumar Naresh Narayan Roy.

Sir John Edge.

material, been very fully and most carefully stated in the admirable judgment of the High Court of Sir John George Woodrofte and Hugh Walmsley, JJ., and with the conclusions expressed by those learned Judges their Lordships agree. They will, however, refer to some other matters which in their opinion bear upon the case, and will then state what is their conclusion as to the two defences which, if proved, would be substantial defences to the claim of the plaintiff to eject the Midnapur Company.

The lands in suit are comprised in an estate which has been periodically settled under Regulation 2 of 1819. As has been mentioned, they are *chur* lands. The proprietary interest in the lands is admittedly vested in the plaintiff and the Midnapur Company as co-sharers, who hold the lands in common. Where lands in India are so held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. No co-sharer can, as against his co-sharers, obtain any *jote* right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them. Their Lordships may refer on this subject of separate cultivation by a co-sharer of lands held in common to what Sir Barnes Peacock said in delivering the judgment of the Board in *Robert Watson and Co.* v. *Ram Chand Dutt* (2). He then said :—

"In India a large proportion of the lands, including many-very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which, in ordinary course, in large estates would probably occupy a period including many seasons."

2. (1889) L R 17 I A at 120-121.

P. C.

Midnapur Zamindary Co., Ltd. v Kumar Naresh Narayan Roy.

Sir John Edge.

In that case the Board made a declaration that Robert Watson and Co., who were the plaintiffs, should recover from the defendant a sum of money, calculated at a specified rate per *bigha* per year, as compensation for the exclusive use by the defendant of the bighas which had been occupied by him.

Their Lordships are not certain that the Midnapur Company has in recent years, if at all, been cultivating any part of the lands in question. If the Midnapur Company has been, in fact, cultivating any of these lands, it cannot by such separate use of the lands have acquired any *jote* rights in them. Even if the Midnapur Company purchased any *jote* rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the *jote* rights so purchased would by the purchase be extinguished. The Midnapur Company alleges as a defence to this suit that tenants of the Midnapur Company, who are not tenants of the co-sharers, have acquired under the Midnapur Company *jote* rights, rights of occupancy, in the lands in suit. Such rights of occupancy, if they existed, would be *raiyati jote* rights, but a *raiyat* cannot acquire under S. 180 of the Bengal Tenancy Act, 1885 a right of occupancy in *chur* land until he has held the land for twelve continuous years, and no evidence has been brought to the attention of their Lordships that any *raiyat* had held any of the lands in suit for twelve continuous years before suit as a tenant of the Midnapur Company, even if a holding of lands by a raiyat under the Midnapur Company, and not under the co-sharers, could confer a right of occupancy on the *raiyat* as against the co-sharers. In Bengal a co-sharer has no more power to confer a right of occupancy on a raiyat than a middleman would have, and in Bengal a middleman cannot obtain as a middleman a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman. (See the judgment delivered by Lord Dunedin in *Midnapur Zamindary Company* v. *Naresh Narayan Roy* (3). (See also the cases referred to at page 116 of the commentary on the Bengal Tenancy Act, 1885, by W. Finucane and Ameer Ali (Syed), edited by F. G. Wigley, Calcutta, 1904.)

Their Lordships return now to the Company's substantial defences to the suit, the first of which is that the suit is barred by the limitation of Article 142 of the First Schedule to the

3. (1922) L R 48 I A 55.

P. C.
Midnapur Zamindary Co., Ltd. *v.* Kumar Naresh Narayan Roy.
Sir John Edge.

Indian Limitation Act, 1908. This raises the question as to what was the possession of the lands in question in this suit which the plaintiff obtained on the 26th July, 1902, and the 20th June, 1903, under a decree for possession of the High Court at Calcutta of 1899 in a suit No. 6 of 1891, in which the plaintift and Robert Watson and Co., who were predecessors in title of the Midnapur Company, were parties. It must be remembered that the plaintiff and Robert Watson and Co., were co-sharers of the lands now in suit, which the plaintiff and the Midnapur Company hold in common as co-sharers. Robert Watson and Co., had been denying the right of the plaintiff as a co-sharer in the lands. A Commissioner was appointed to deliver possession to the decree holders, and he delivered possession under S. 264 of the Code of Civil Procedure of 1882 by the usual modes of sticking bamboos and the beating of drums, and by proclaiming aloud in Bengali, in the presence of a number of persons of the vicinity, the terms of the decree of the High Court and of the *Parwana* of the Court of the Subordinate Judge of Nadia. In India persons are not permitted to take forcible possession ; they must obtain such possession as they are entitled to through a Court. The plaintiff was not entitled to get possession by ousting his then co-sharers, Robert Watson and Co., from possession of lands which they were entitled to hold in common as co-sharers ; the possession which the plaintiff got was a possession of the lands in his proprietary right as a co-sharer. The High Court had declared that there were no *jote* rights in the lands. The possession which the plaintiff got in 1902 and in 1903 was within twelve years of the 8th August, 1912, and the suit was not barred by the law of limitation.

As to the other material defence, which is one of *res judicata,* their Lordships feel that they cannot add anything to what Sir John George Woodroffe and Hugh Walmsley, JJ., said in their judgment on that subject, with which they agree. But to prevent the possibility of any further doubts being suggested at any time on that matter, their Lordships repeat what those learned Judges said. Referring to the litigation which began in 1891, they said :—

"We now pass to the issue of *res judicata,* the facts as to which are as follows :—

"In the plaint in Title Suit 6 of 1891, the plaintiffs, *i. e.,* members of the Putia Raj family, alleged that the Revenue authorities had been wrong in holding that Watson and Co., and not the plaintiffs, were in possession of the land

P. C.

Midnapur Zamindary Co., Ltd. v. Kumar Naresh Narayan Roy.

Sir John Edge.

that was being settled in 1887, and that Watson and Co., dispossessed them by virtue of the order of the Board of Revenue that the settlement was to be with Watson and Co. They admitted that Watson and Co. owned an undivided share of 3 annas odd with themselves in the mahal. Their prayers were as follows :—

(*a*) For a declaration that the land appertained to *towzi* No. 814 ;

(*b*) For a declaration that they were entitled to get settlement from the Collector ;

(*c*) For recovery of possession.

(*d*) For mesne profits, provisionally estimated at Rs. 1,692.

"The defence was (a) that some of the land in suit, viz., 1,558 bighas 1 K. 10 ch., had accreted to their estates chur Hogulberia and Niamatpur, as held by the Revenue authorities ; (*b*) that the remainder had accreted to their estates Udainagar, Temadia and others ; (*c*) that they had acquired a right by adverse possession ; and (*d*) that the plaintiffs could not in any event obtain *khas* possession. Other pleas were raised, but we are not concerned with them.

"It was found that the plaintiffs' claim was barred as to the 1558—1—10 by adverse possession for twelve years, but that the remainder of the land was an accretion to mahal No. 814, and that the defendants had not been in adverse possession for the statutory period. These findings of the first Court were upheld on appeal.

"Regarding *khas* possession an issue was framed as follows :—'Are the plaintiffs entitled to recover *khas* possession of the land in suit ? Have the defendants any *jotedari* right in the land ?' But, on December 28th, 1893, the plaintiffs' pleader made a statement in these words : 'The plaintiffs claim only a right to the settlement of the disputed land and no other right.' On the same day the defendants' pleader made a statement, and asserted that, in any event, *khas* possession could not be given because the defendants had *jotedari* right in the land. As a result of the statement made by plaintiffs' pleader, the learned Judge did not decide the issue. He said : 'The plaintiffs do not ask for *khas* possession. Hence it is not necessary to enquire whether the defendants have a *jotedari* right in the lands.'

"Watson and Co., preferred an appeal, and raised the question that the Judge had left open, in the eighteenth and nineteenth paragraphs of their memorandum. It will be seen from these grounds that the appellants who now contend that the decision of the issue was unnecessary, expressly invited this Court to decide it. The eighteenth of their grounds of appeal ran as follows : 'For that the learned Sub-Judge having held that it was not necessary to enquire whether the appellants have *jotedari* right in the lands in suit, has erred in giving a decree for possession of the same to the plaintiffs.' The nineteenth ground was equally explicit and ran : 'For that it should have been held that the appellants are entitled to hold most of the disputed lands in jote rights and that the plaintiffs have no right to evict them from the same without determining their tenancy in the manner prescribed by law.' The point was pressed in argument before this Court, but it was held that there was no evidence in support of the contention.

"The decree that was drawn up in this Court made no express mention of the decision on this point in terms : it affirmed the First Court's decree with modifications intended to remove uncertainties.

"In the present suit the plaintiff says that the decree was to the effect that the Raj should get possession after ejectment of Watson and Co., that Watson and Co., were ejected and possession delivered. The statement continues: 'But the plaintiff has not in reality got possession of the decreed lands in proper order even in spite of their having obtained possession in manner aforesaid and the defendant Company have illegally and without any right been still holding possession of the whole of the decreed lands."

"The prayers are as follows.—(*a*) For a declaration that the Company has not, never has had, and never can have, jote rights in the lands covered by the decree in Title Suit No. 6 of 1891; (*b*) for a partition of those lands and of the land in Towgi No. 814 as it was in 1891; (*c*) for possession of the separate share of 5 a. 16 g. 2 k. 2 kr to be alloted to the plaintiff by the ejectment of the defendant Company; and (*d*) for an account and mesne profits, &c.

"There is no dispute about the identity of the land now in suit with the land of the previous suit.

"Now, had the matter rested where the Subordinate Judge left it, no such question as we have to discuss would have arisen. Whether the suit might and should have been properly determined without entering into the question of the tenancy right as the plaintiff apparently wished to do, we need not now enquire. For, in fact (as we have seen), the present appellants directly insisted on the point being tried, and alleged that the First Court should have done so. It was contended before us that whatever the appellants might have done in this respect, the issue in fact was not a necessary or proper one to be tried in that suit, and that it is open to us to say so. But we must see first whether this Court adjudged otherwise, that is, whether this Court having the question before its mind decided that the issue did arise. If so, that decision would be as much *res judicata* as the final determination of the issue on the merits. If we are of opinion that the Court did so decide, we are not concerned to see whether it did so rightly or not, and indeed cannot do so. Now this is not a case, as not infrequently happens, where incidentally some point is decided which is not necessary, which was not of first-rate importance or especially brought to the notice of the Court. The plaintiff had excluded the question by the statement of his pleader. The First Court had therefore expressly stated that it could not decide it. The defendant, the present appellant, has expressly urged that the Judge was wrong in not deciding this question even though his action was based on the plaintiff's adviser's statement and he asked this Court expressly to decide it. As the Court did so, it seems to us that we ought to assume not that it did something which was unnecessary, but that in so far as it decided the point raised, it must also have decided that the then defendant's objection that the point should be tried was a good one and that the issue was one which did arise in the suit.

"Then what did the learned Judges say? Maclean, C. J. after disposing of the question of reformation, sets out the three contentions of the then defendants and present appellants, the third of which was that the defendants are entitled to *jotedari* right. On this the Chief Justice held that no such rights were anywhere recorded, nor was there any evidence of such rights. It was, he said, for the then defendants and present appellants to make out such right, but that they had not succeeded in doing so. Banerji, J., states the contention 'that the plaintiffs cannot claim khas possession as the defendants had *jotedari* rights in the greater part of the lands in suit.' He says that that was part of the defence

P. C.

Midnapur Zamindary Co., Ltd. v. Kumar Naresh Narayan Roy.

Sir John Edge.

which it was necessary to consider. He then points out that the First Court did not consider the question of *jotedari* rights necessary to be determined, and expressly refers to the ground of appeal that the First Court ought to have determined the question of tenancy right, and held that the possession to which the then plaintiff was entitled was subject to the tenant right of the present appellants. It is quite clear from the above that the then defendants' case was present to the minds of the Court. The learned Judge then proceeded to decide it and held that there was no *jote* right. If the learned Judges had thought the issue unnecessary, they would presumably have said so and not decided it. But they did decide it. Can it be said under these circumstances that the point was not raised, that the Court did not consider it to be a necessary issue and did not impliedly decide that it was necessary and did not decide the issue on the merits ? We think the answer is clearly in the negative. Then what of the decree ? It is true that it does not expressly refer to the tenancy right, but it gave a decree for possession. What, then, did it intend to give ? For the appellant it is said that all that was given was possession as co-proprietor and that the question whether such possession was free of the alleged tenancy right was left untouched. But if so, what was the necessity of discussing the question in the judgment ? We ought not, we think, to assume that the Judges discussed a question which was irrelevant to the case ,and then granted no relief in respect of it ; but rather that as they had discussed and negatived the alleged tenancy right in the judgment they intended to, and did, give a decree which should give effect to these findings. If so, the learned Judges' decree in effect gave to the respondents before us a right to the lands in that suit free of the alleged tenancy right claimed. We are of opinion therefore that the issue as to the appellants' right is *res judicata.*"

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs, but that the decree of the Subordinate Judge be varied by substituting for his order as to mesne profits an order that the Midnapur Company is to pay compensation to the plaintiff for the exclusive use by the Midnapur Company themselves or by their tenants of the lands in suit from the 20th June, 1903, until partition has been effected and possession of the lands falling on partition to the plaintiff has been delivered to the plaintiff. Such compensation is to be ascertained and assessed in the High Court or in the court of the Subordinate Judge of Nadia as the High Court may direct, and the plaintiff's costs, which may be incurred in the ascertaining and assessing of such compensation, are to be paid to him by the Midnapur Company.

Solicitor for appellants : *Burton, Yeats and Hart.*

Solicitors for respondents : *W. W. Box and Co.*

A. D. M. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD MANERBURGH, SIR JOHN EDGF, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

(On Appeal from the High Court of Judicature at Madras.)

Kadoth Ambu Nair *Appellant**

v.

Secretary of State for India in Council Represented by the Collector of South Canara *Respondent.*

P. C.

Ambu Nair.
v.
Secretary of State for India.

Limitation Act (IX of 1908), Art. 120—Wargdar Kumri lands—Title of Karnavan--Recognition by Government of—Cultivation by license of Government —Long possession —Presumption—Wargdar Kumri lands distinguishable from Ryotwari holdings—Presumption of ownership by Government—Revenue Order No. 830 of 23rd May 1860.

The presumption as to absolute title to forest tracts and waste lands in Canara, cultivated as *Kumri* is in the Government, such cultivation being by its license or permission, and the licensee cannot claim title only by possession, however long, unless by showing that such possession was adverse to that of the licensor, to his knowledge and with his acquiescence. *Bhaskarappa* v. *Collector of North Canara,* I L R 3 Bom. 452, and *Secretary of State* v. *M. Krishnayya,* 25 M 257 followed and approved.

In 1908, the Government marked off the lands in suit and issued to the plaintiff as the *Karnavan* of his Tarwad a rough *patta,* showing the lands to which the Government admitted his right to a grant subject to the usual conditions. The plaintiff then objected to the exclusion from the patta of the lands in suit, but his objections were rejected in 1905. On the 25th November, 1913, he instituted the present action for a declaration of his right to the excluded lands. *Held,* that, under Art. 120 of the First Schedule to the Limitation Act (IX of 1908), the period of limitation being 6 years, the action was barred.

Appeal from Judgment and decree of the High Court of Judicature at Madras (11th December 1919), affirming an appellate judgment and decree of the District Court of South Canara (3rd August 1917), which affirmed a Judgment and Decree of the Subordinate Judge of South Canara (29th March, 1916.)

The lands which formed the subject of the suit consist of 15 "Kumries" (tracts of jungle cleared and cultivated once every 8 or ten years), situate in the village of Panathadi and Bedadka in Kasargod Taluk (formerly known as Bekal Taluk), south of the River Chandragiri in South Canara.

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* Privy Councll Appeal No. 53 of 1922.

P. C.

Kadoth Ambu Nair. *v.* Secretary of State for India.

On the 25th November, 1913, the appellant instituted the present suit in the District Court of South Canara, alleging in his plaint as follows :—

"5. The plaint *Kumries* belong to the plaintiff's *Tarwad,* some as portions of their ancient *muli wargs,* some on right of purchase from their original proprietors, some, though acquired in the first instance on mortgages from the previous *wargdar's* ,now belong to the Tarwad on *muli* right acquired by prescription, and a few on mortgage right.

"6. The plaint *Kumries* have been in the exclusive possession and enjoyment of the plaintiff and his predecessors in interest for more than a century on their own proprietary or *warg* right.

At the last settlement, the plaint *Kumries* having been omitted from the *pattas* granted to the plaintiff's *Tarwad,* the then *Karnavon* of the plaintiff's Tarwad, on enquiry came to know that the said *Kumries* have been treated as Government lands, and repeatedly petitioned the Revenue authorities to set right matters by including the said lands in the pattas of the plaintiff's Tarwad ; but the request of the plaintiff's Karnavan was finally refused on the 3rd May 1911 and 30th June, 1911.

"8. The Government have no right over the plaint *kumries* beyond that of receiving the assessment thereon, the said lands being *warg Kumries* ,and the rights, if any, of the Government have been lost by long and uninterrupted possession and enjoyment as of right on the part of the plaintiff's Tarwad and its predecessors adversely to the Government for more than the statutory period.

"9. The plaintiff learns and verily believes that the plaint lands have been acknowledged to be *warg Kumries* and included in the register of *warg Kumries* maintained by the Government and are not included in the register of Government *Kumries ;* the defendant is, therefore, estopped from claiming the plaint lands as belonging to Government.

"10. The Government was, therefore, bound to recognise the right of the plaintiff's Tarwad for the Kumries in question, and to issue pattas to the plaintiff's Tarwad in respect of them.

"11. The defendant has no right to levy any penal assessment in respect of the plaint Kumries from the plaintiff's Tarwad, not to deal with the lands to the prejudice of the rights of the plaintiffs tarwad nor to interfere in any way with the rights of the plaintiff's Tarwad to, and possession of, the said Kumries."

and prayed for a decree declaring that the Kumries described in the schedule belonged to the plaintiff's Tarwad and ordering the issue of pattas to plaintiff for the same, and restraining the defendant by an injunction from dealing with the said Kumries to the prejudice of the rights and possession of the plaintiff's Tarwad in any manner, relief valued at Rs. 2,600."

The written statement of defence put in on behalf of the government was as follows

"Defendant denies that the plaint *Kunmries* belong to the plaintiff's *Tarwad,* or that he is in any way entitled to get a *patta* in respect of the same.

"Defendant further denies the exclusive possession and enjoyment set up by the plaintiff in para. 6 of the plaint. Even if the plaintiff's *Tarwad* or its predecessors in title have been at any time in enjoyment of the plaint *Kumries*

P. C.

Kadoth Ambu Nair. *v.* Secretary of State for India.

or portions of the same, such enjoyment has not been adverse to the rights of Government, nor can it confer any proprietary or *jenm* right on plaintiff's *Tarwad.*

"The plaint *Kumries* having been classified as unoccupied assessed *Kumries* at the time of the survey and Settlement, plaintiff's present suit for a declaration questioning the said classification after such a long lapse of time is barred under the law of limitation. The date of the cause of action has been incorrectly stated in paragraph 14 of the plaint.

"Defendant denies that the plaint *Kumries* are *warg Kumries* and that the rights, if any, of Government have been lost by long and adverse enjoyment on the part of the plaintiff's *Tarwad* or its predecessors in title. On the other hand, by the several rules and restrictions ever and anon laid down by Government in connection with the *Kumri* cultivation, and in the Southern *Maganes* of the Kasargod Taluk, Government have all along asserted their title and proprietorship to the plaint and other *Kumries* of this district.

"Defendant expressly denies the allegation made in para. 8 of the plaint, and puts plaintiff to the strict proof of the same.

Upon the above pleadings the following issues were framed before the Subordinate Judge of South Canara to whom the action had been transferred for trial :—

"1. Whether the plaint *Kumries* belong to the plaintiff's *Tarwad,* and whether the plaintiff is entitled to have them included in his *patta?*

"2. Whether the plaintiff's *Tarwad* has acquired any right by adverse possession to the plaint *Kumries* as against the defendant ?

"3. Whether the defendant is estopped from asserting the right of the Government to the plaint *Kumries*

"5. Whether the description, names and other particulars of the *Kumries* given in the plaint, are not correct ?

"4. Whether the suit or any portion of it is barred by limitation ?

"6. Whether the plaintiff is entitled to the declaration and injunction as claimed ?

"7. To what relief, if any, is the plaintiff entitled?" and, on the 29th March, 1916, the Subordinate Judge (V. C. Mascarenhas, Esq.,) delivered his judgment, dismissing the suit. He held :—

(*a*) On the 1st issue, that no title deeds were produced in support of the plaintiff's case, that some of the lands in question formed part of the Tarwad's ancestral holdings, the documents relied on by the plaintiff were copies merely, and, therefore, neither primary nor secondary evidence within

P. C.

Kadoth Ambu Nair. v. Secretary of State for India.

the meaning of Ss. 62, 63, and 65 of the Evidence Act, and, therefore, inadmissible as there was no satisfactory explanation of the loss of originals

(*b*) On the 2nd issue, that accepting the definition of "*Kumri*" in I. L. R. 28 Mad. 257 at p. 270 as "A cultivation of land outside a *warg* by felling and burning a portion of the forest, the ashes acting as manure : after one or two crops, abandoning the plot and treating a fresh patch in the same way," the decision in 3 Bombay 452 was applicable to South Canara, and that the plaintiff could not acquire ownership by a adverse possession and prescription.

(*c*) On the 3rd issue that the entry in the Government registers did not estop the Government from claiming the *Kumries* as belonging to them :

(*d*) On the 4th issue the cause of action arose in 1903-1904, when the Government treated the *Kumries* referred to in the plaint as Government *Kumries*, and, therefore, the suit was barred by limitation :

(*e*) On the other issues, he held also against the plaintiff.

Against this decree, the plaintiff appealed to the District Court, and the District Judge (L. G. Moore, Esq.,) on the 3rd August 1917, pronounced judgment affirming the judgment of the Subordinate Judge. The plaintiff thereupon preferred a second appeal to the High Court at Madras, (Oldfield and Sheshagiri Ayyar, JJ.), who, on the 11th April 1919, called for certain findings from the District Court on the question of possession. Such findings having been in due course received, the High Court on the 11th December, 1919 affirmed the judgments of the inferior Courts and dismissed the appeal. The plaintiff thereupon appealed to His Majesty in Council.

De Gruyther K. C. and *Narasimham* for appellant.

The proprietary interest in the suit lands is, and has since the year 1780 been, in the Appellant's Tarwad, and has never been in the Government. Even if the Government were at some time the owners, the Appellant has established a title by adverse possession for a period of over 60 years. A large number of the documents proving the appellant's title and possession have been wrongfully rejected by the Courts in India. The decisions in *Secretary of State for India* v. *M. Krishnayya* (1) and *Bhaskerappa* v. *Collector of North Canara* (2) do not apply to the lands in dispute in this suit.

1. (1905) I L R 28 M 257. 2. (1879) I L R 3 B 452.

P. C.

Kadoth Ambu Nair. v. Secretary of State for India.

Dunne K. C. and Kenworthy Brown for respondents. The decrees of all the three Indian Courts are concurrent and against the appellant, and this Board will not, therefore, interfere. The District Judge's findings of fact moreover cannot be upset. It was rightly held that the title to the first lands, including the said *Kumri* lands is in the Government, and the appellant has not established title in his Tarwad to the Kumri lands or any of them. The acts done by the appellant or his predecessors on the said lands do not amount to adverse possession thereof for 60 years or for any other period. The suit being brought more than 6 years from the denial by the Government of the appellant's alleged title and his knowledge of such denial, was barred by limitation. As to the appellant's so-called "documents of title," the District Judge rightly applied the Evidence Act, Ss. 65 and 74. None of the copies in evidence, nor the Tahsildar's schedule of documents could be treated as "secondary evidence," the loss of the originals not having been proved, and the title of the supposed vendors or mortgagors not having been established. In so far as the decision in *Secretary of State* v. *Vira Rayan* (3) is relied upon as applicable to the lands in suit, it is submitted that that decision is erroneous.

The following authorities were also referred to in the course of the argument. *Nithyanundroy* v. *Abdur Rahim* (4) *Secretary of State* v. *Kasturi Reddi* (5) : *Bommaraja Bahadur* v. *Venkatadiri Naidu* (6) *Ram Gopal Roy* v. *Stuart and Co.* (7) *Ponnamal* v. *Soondara Pillai* (8).

7th April 1924. The Judgment of the Board was delivered by

Mr. Ameer Ali

MR. AMEER ALI :—This appeal arises out of a suit brought by the plaintiff in the Court of the Subordinate Judge of South Canara on the 25th November, 1913, as the *Karnavan*, or Manager, of a Nair *Tarwad* against the Secretary of State for India in Council for a declaration that certain lands situated in the forest tracts in the Kasargod Taluk belong exclusively to his *Tarwad*, and for an injunction restraining the defendant from dealing in any manner with the said lands to the prejudice of the rights and possession of the plaintiff's *Tarwad*.

3. (1885) I L R 9 M 175.
4. (1881) I L R 7 Cal. 76.
5. (1902) I L R 26 M 268.
6. (1858) 7 M I A 128.
7. 14 M I A 453.
8. (1900) I L R 23 M 499 10 M L J 300

P. C.

Kadoth Ambu Nair. *v.* Secretary of State for India.

Mr. Ameer Ali.

Their Lordships will have to refer more specifically in the course of their judgment to the allegations in the plaint, but it is sufficient at this stage to indicate the scope of the suit. The defendant denied the title which the plainiff put forward ; and the Subordinate Judge found that the plaintiff had totally failed to establish the grounds on which he based his claim, and accordingly dismissed the suit. The plaintiff preferred an appeal to the District Judge who came to the same conclusion as the Court of first instance and accordingly affirmed the decree of the Subordinate Judge, dismissing the suit. There was a second appeal by the plaintiff from the decree of the District Judge to the High Court of Judicature at Madras which, apparently being of opinion that the District Judge had not sufficiently considered the evidence of possession adduced on the plaintiff's behalf, remanded the case for a fresh finding.

When the case came before the District Judge the second time he again examined the evidence thoroughly, almost meticulously, and came to the conclusion, as on the previous occasion, that the plaintiff had utterly failed to establish the three propositions on which he based his claim : firstly, long possession ; secondly, prescription ; and thirdly, recognition by the defendant of the *Tarwad's* title working as an estoppel. He also found in concurrence with the Court of first instance that the suit was barred under the Statute of Limitation. If the suit is barred by limitation the question of title would not arise. But it appears to their Lordships that it will be more satisfactory to the parties that they should express their opinion on the question of title, before dealing with the question of limitation.

The case then went back to the High Court and the learned Judges accepted, on the 29th January, 1920 the findings of the District Judge and dismissed the suit. The present appeal is from this decree of the High Court.

In order to explain the nature of the present litigation and the contentions advanced on the plaintiff's behalf before the Board, it is necessary to describe as concisely as possible the character of the lands in respect of which the claim is made and how these lands have been dealt with until now. The district of South Canara lies to the north of Malabar and to the west of Mysore and Coorg ; in the north lies North Canara and on the west the Arabian Sea. The whole district at a short distance from the sea is covered with immemorial forests.

P. C.

Kadoth Ambu Nair v. Secretary of Sta e for India.

Mr. Ameer Ali.

Mr. Sturrock, who was Collector of South Canara in the eighties, describes the country thus in his Manual of the South Canara District :—

"South Canara is essentially a forest district. The slope of the western ghats from north to south clothed with dense forests of magnificent timber and the forest growths, stimulated by the heavy rainfall, approaches within a few miles of the coast."*

The lands in suit are situated south of the Chandragiri River, and, as already stated, in the Kasargod Taluk, formerly Bekal Taluk. In the lowlands below the forest ridges there lie the farms and holdings of the *ryots,* which are called "*wargs.*" It appears from the record that the *wargs* the ryots hold in their own right are called "*muliwargs.*" These ryots and farmers, it appears, are in the habit of going upon the forest lands, clearing a part of the jungle and raising a temporary crop on it. After the crop is reaped, this patch is abandoned and some other part is taken up. For this privilege they have been paying a small fee to the Government. These patches are called "*kumries,*" and the lands so desultorily cultivated are designated in the proceedings relating to the subject as "*kumri* lands." The *wargs* do not constitute a farm or an estate of a compact character, the component parts often lying apart from each other. The plaintiff's case is that he has a number of *Kumri* lands in the forest, attached to the various plots of *wargs* which he holds and he claims that his Tarwad has acquired an absolute title to these lands, partly by long possession, partly by adverse possession against the defendant, and partly by purchase and usufructuary mortgages. He also claims that the Government recognised his title and are now estopped from denying it.

The first question, then, that emerges from these allegations, is what is the nature of the forest tract, and secondly what are the incidents of the *Kumri* lands. It has been held in two cases†, one decided by the Bombay High Court from North Canara under not dis-similar conditions, the other decided by the High Court of Madras from South Canara, in both of which the identical question arising in the present appeal was involved, that the Government had an absolute title to all the forest tracts which belonged absolutely to the Crown. Their

* Page 13.

†*Bhaskarappa* v. *The Collector of North Canara,* I L R 3 Bom 452 ; *Secretary of State for India in Council* v. *Manjeshwar Krishnayya,* I L R 28 Mad., page 257 15 M L J 147.

P. C.

Kadoth Ambu Nair v. Secretary of State for India.

Mr. Ameer Ali.

Lordships consider it would answer no useful purpose to travel, as they have been invited to do, in the regions of ancient history. Whatever may have been the custom in ancient India, or under Mohammedan rule, what they have to see is how these lands were treated since the British acquired this part of the country. Ever since 1800, when South Canara was conquered from Tippoo Sultan, the Mohammedan ruler of Mysore, the British Government—in a series of documents which have been carefully examined in th cases referred to above—asserted and exercised their right in the forests. Their Lordships desire to refer only to two of these documents. On the 23rd of May, 1860, by a resolution of the Government of Madras (in the Revenue Department) it definitely pronounced in favour of checking the practice of *kumri* cultivation. Among the reports on which it rested its decision was a communication from the Conservator of Forests dated 17th August, 1859, in which he calls attention to what he describes as "the chief evils of this rude system of culture," viz. :—

"the destruction of valuable timber, at present urgently required for ship-building and railways, and rendering of land unfit for coffee cultivation."

This document also speaks of the method of cultivation in vogue on *Kumri* lands. There were other proceedings which similarly show that the Government claimed to exercise an absolute right in respect of these immemorial forest and waste lands, and constantly asserted its title. But the matter was clinched in 1884 when the Governor in Council passed an order, dated 29th August, 1883, finally stopping the right of the neighbouring farmers and ryots to go upon the forest lands for the purpose of clearing patches by destroying the trees, in order to cultivate crops on the clearings. The document is so important that it should be quoted in full.

After referring to the report with which it was concerned, it goes on as follows :—

"2. To survey and demarcate the lands in which kumri is now cut and to impose upon it an acreage rate of assessment—which under the Board's proposal is to confer complete rights of dealing with the land and with the wood growing thereon—would in the opinion of His Excellency in Council tend to compromise the right of Government to deal with the lands as may seem advisable hereafter and to create notions of proprietary right in the *Wargdars* which do not in fact exist. Forest settlement will probably not be undertaken for years in South Kanara and the forest officers cannot possibly indicate at present lands which will

P. C.

Kadoth Ambu Nair. v. Secretary of India.

Mr. Ameer Ali.

be wanted for reservation. Mr. Sturrock's proposed survey would doubtless cost more than he estimates and would probably be far from accurate when finished.

"3. His Excellency in Council accordingly directs that existing arrangements and restrictions (which are in fact those prescribed in G. O., 24th October, 1861, No. 2032) in respect of the *kumri* cultivation in question, shall continue, with the exception of a charge of a rate of one rupee an acre on extent actually felled. In lieu of this the Collector is authorised to compound the demand at his discretion for an annual payment not exceeding seven times the *shist* and *shamil* in case of a *Wargdar kumri*, and in the case of other permitted *kumri*, of such amount as may seem to him just with reference to past average charges. At the same time a register should be prepared recording as accurately as possible the boundaries and descriptive particulars of the tracts within which each *Wargdar* is allowed to cut *kumri;* and during the felling season, the revenue and forest subordinates should be on the alert to prevent felling outside the authorised limits, in virgin forests and in jungle of twelve years' growth.

"4. Under the above arrangement no masurement need be made in the current season, and no orders are required on the second of the Proceedings above read."

Pursuant to this order rules were framed for the regulation of *Kumri* cultivation, which also are important and should be set out in full :—

"I. The cultivation of *kumri* is strictly prohibited in—

1. Virgin forests.
2. Cardamon and pepper forests.
3. Forests whch have not been *kumried* for 12 years or upwards.
4. All forests outside the tracts recognised as *kumries* attached to wargs

"2. All parties contravening Rule 1 will be criminally prosecuted.

"3. A Register will be prepared recording as accurately as possible the boundaries and descriptive particulars of the tracts within which each *Wargdar* is allowed to cut *kumri.* In the preparation of this Register care will be taken to exclude all tracts falling under Rule 1.

"4. Every *Potail* in whose village there is *warg kumri* will report on the 1st April of each year whether the provisions of Rule 1 have been strictly observed in the annual fellings and all Revenue Forest Officers will take every opportunity of checking the correctness of these reports, and otherwise assisting the prevention of felling outside the authorised limits.

"5. Assessment will be collected at a fixed annual amount, irrespective of the annual clearings which will be left to the discretion of the *Wargdar* concerned, subject to the provisions of Rule 1.

"6. Nothing in the above rules shall be held to preclude Government from taking up for reservation, under the provisions of the Madras Forest Act, 1882, any land now occupied for *kumri.*"

In accordance with the Rules, notices were issued by the *tahsildar* apparently on all the *Wargdars* who were in the habit of entering the forest and making *kumri* cultivation. About

P. C.

Kadoth Ambu Nair v. Secretary of State for India.

Mr. Ameer Ali.

the same time a register was opened (Exhibit F) showing the details of the boundaries, etc., of the *Kumri* lands with regard to which permits had been issued previous to the Government order. It shows to the *Wargdars*, who had been in the habit of promiscuously entering the forests and making clearings, the exact limits which they were permitted to enter for raising temporary crops.

It is quite clear from these records that throughout, wherever *Kumri* cultivation was allowed, it was permissive. The people who cultivated these patches of land had to pay a fee for the permits which they obtained for purposes of cultivation and nothing more than these fees were entered in the registers, but they do not indicate any right in the persons who paid fees for the permits.

The right of the Government has been carefully examined and precisely set forth in the two judgments to which reference has already been made. Their Lordships, therefore, do not think it necessary to discuss further the question, beyond expressing their general concurrence with the conclusions arrived at by the learned Judges of the two High Courts namely, that there is an undoubted presumption that forest tracts and old wastes belong to the Government unless that presumption is displaced by positive evidence that the right has, in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals ; or rights have been consciously allowed to grow up adversely to the Government.

Bearing this principle in mind their Lordships have to examine what evidence the plaintiff has adduced in this case to establish the right he claims. The grounds on which he bases the claim of his *Tarwad* are set out in paragraphs 4, 5 and 6 of the plaint. In paragraph 4 he says as follows :—

"That the properties particularised in the annexed schedule are ancient *warg kumries* situated in the villages of Panathadi and Bedadka in Kasargod Taluk (formerly Bekal) and lying to the south of the Chandragiri River."

Paragraphs 5 and 6 are in these terms :—

"That the plaint kumries belong to the plaintiff's Tarwad, some as portions of their ancient muli wargs, some on right of purchase from their original proprietors, some, though acquired in the first instance on mortgages from previous wargdars, now belong to the Tarwad on muli right acquired by prescription and a few on mortgage right.

P. C.

Kadoth Ambu Nair *v.* Secretary of State for India.

Mr. Ameer Ali.

"That the plaint kumries have been in the exclusive possession and enjoyment of the plaintiff and his predecessors in interest for more than a century on their own proprietary or warg right."

In other words he bases his title to the plots of land in respect of which the suit is brought on long enjoyment as parts of his *muli wargs ;* secondly, on rights acquired by purchase and mortgage ; and thirdly, on adverse and exclusive possession for more than a century in proprietary or *warg* right. In paragraph 9 of the plaint he puts forward a claim by estoppel against the Government : his statement is to the effect that the lands in suit have been acknowledged to be *warg kumries* and included as such in the register of Government *kumries.* The *onus* of establishing these allegations rests on him.

The last contention requires some explanation. It appears that the Government for the purposes of clearing the undergrowth in the forests, have been in the habit of allowing the forest tribes who sparsely inhabited the forest to make clearances, and grow such cereals as they were capable of. These primitive tribes cultivated certain spots, reaped the crop and then moved off to some other patches of land. These apparently were called Government *Kumries.* The Government also allowed some of the neighbouring *Wargdars* to take the leaf manures from the forest and clear the undergrowth for the desultory cultivation, called *Kumri.* These apparently are designated *warg kumries.* In all these cases, dealings with forest lands appear to have been by distinct permission of the Government. Has the plaintiff been able to show either old possession of the *kumri* lands, which he says have become attached to his *wargs* by long enjoyment, or has he been able to show that he has acquired a right by adverse possession to the exclusion of the Government ? Both the Subordinate Judge as well as the District Judge, whose judgments on appeal on questions of fact, properly and regularly arrived at, are conclusive, have held, upon a careful examination of the evidence, that the plaintiff has failed to establish a continuous enjoyment beyond 35 or 40 years from the date of the suit. The period of limitation against the Government is 60 years. Assuming that a licensee can convert a permissive occupation into an absolute title by long possession, the period of possession proved by the Tarwad falls short of the period of prescription. Their Lordships think that a licensee cannot claim title only from possession, however long, unless it is proved that the possession

P. C.

Kadoth Ambu Nair v. Secretary of State for India.

Mr. Ameer Ali.

was adverse to that of the licensor, to his knowledge and with his acquiescence. The plaintiff produced no evidence to show that the Government either acquiesced in his exclusive possession or did in fact, evince that consciously they acquiesced in the *Tarwad's* adverse possession.

Apart from this, the Courts in India, who were Judges of fact, have held that the boundaries which the plaintiff has set up are unidentifiable. As regards title by transfer, they have found that in no case has the knowledge been brought home to the officers of Government that any of these lands were sold or mortgaged with their consent.

As regards a grant emanating from the Government, there is absolutely no evidence. No *Potta* has been produced showing a grant by the Government. The inference is inevitable that the plaintiff possessed no such *potta.*

The order of the 23rd May, 1860, No. 830, made clear the position in which the people who were licensed to enter the forests for the purpose of desultory cultivation, stood in relation to the Government. Paragraph 8 of this order runs as follows :—

"The Board give their decided opinion against the validity of any claim to proprietary rights in forest, based on the entry of 'kumri sist' in the patta or the account of any estate. They regard it as simply a rent or farm of the privilege of cutting kumri in the tract in question ; the continuance of which must depend on the pleasure of the Government. The facts detailed in their proceedings seem fully to bear out this view."

In the proceedings of the Board of Revenue dated 24th July, 1860, the Government's rights as regards the wargdar *kumries* are placed on the same basis as the Sirkar or Government *kumries* :—

"The Board understand the Government proposal to raise the rate of assessment on the kumri cultivation of the Bekal Taluk, to apply to 'Wargdar kumri' so called as well as to Sirkar kumri as the Government do not admit that the rights of the former are in any way superior to those of the latter, or that the entry of that item, among others in the warg, originally denoted anything more than that the wargdar was also the temporary renter of certain jungle farms or privileges, which the Sirkar was competent to modify or discontinue at will; and it is solely as an act of grace that in the Bekal Taluk the Wargdar, whose warg includes the item, is in consequence of the more systematic nature of the cultivation still to be recognised as the party with whom Government have to deal for the realization of the Assessment, which elsewhere will be made directly with the kumri ryots."

On behalf of the appellant an argument was put forward before the Board which does not appear to have been advanced

P. C.

Kadoth Ambu Nair v. Secretary of State for India.

Mr. Ameer Ali.

in any of the Courts in India. Their Lordships do not desire to rule out summarily on that ground the contention which has been so strongly urged before them. It is contended that the incidents attached to these *wargdar kumries* stand on the same footing as *ryotwari* holdings. The chief ground on which this analogy appears to be founded, as learned Counsel admitted, were two facts, namely, that the *wargdar* possessed in these *kumri* lands a heritable and transferable interest.

In order to prevent future confusion their Lordships desire to say that there is absolutely no relation or analogy between the nature of these *kumri* lands and ryotwari holdings. The latter belong to a totally different category of tenures. Ryotwari holdings relate to arable lands for fixed periods—ordinarily 30 years—and are subject to periodical surveys and assessments. No inference, therefore, can be derived from the fact that *kumri* lands cultivated on the *kumri* system, were held by *wargdars* whose property is transferable and heritable.

Coming now to the question of limitation it appears that in 1903 the Government officials marked off the lands in suit and issued to the plaintiff as the *Karnavan* of his Tarwad, what is called a *rough* potta, showing the lands to which Government admitted his right to obtain a grant subject to the usual conditions. The plaintiff preferred objections to the exclusion from the rough *potta* of the lands in suit. His objections were definitely rejected in 1905.

The present suit to set aside that order and to obtain a declaration of his right was not brought until 1913. Article 120 of the first Schedule of the Limitation Act (IX of 1908) applies to this case. It provides that the period of limitation for a suit " for which no period of limitation is provided elsewhere in this Schedule " shall be six years. No period of limitation is specifically provided elsewhere for the assertion of a claim of this kind. Their Lordships think that the lower Courts rightly applied Article 120 to this suit.

On the whole their Lordships are of opinion that the appeal fails and should be dismissed with costs and they will so humbly advise His Majesty.

Solicitor for appellant : *Douglas Grant.*

Solicitor for respondent : *Solicitor to the India Office.*

A. D. M. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD BLANESBURGH, LORD SALVESEN, SIR LAWRENCE JENKINS AND MR. AMEER ALI.

(On Appeal from the High Court at Fort William, Bengal).

Secretary of State for India in Council ... *Appellant**

v.

Roy Jatindra Nath Chowdhury and another. . .*Respondents.*

P. C

Secretary of State for India *v.* Roy Jatindra Nath Chowdhury.

Accretion and alluvion—Assessment of land revenue, mode of—Act IX of 1847—Diara Survey—Map—Re-survey by Super-imposition—Functions of Board of Revenue.

Under Act IX of 1847, the Board of Revenue is the proper authority in cases of accretion or alluvion, and all matters of survey, measurements, boundaries, etc. of assessable land, and its decisions are final, provided that (1) there has been no fundamental irregularity in its proceedings indicative of defiance of or non-compliance with, the essentials of legal procedure, (2) the *onus* of establishing such essential and fundamental violation, if any, of statutory requirements is upon the person alleging it, (3) any doubts on matters of fact such as inaccuracy or incompleteness of maps or surveys which are within the special province of the Board of Revenue should be promptly advanced before the Board in the course of the proceedings before it, without which Courts of Law will not entertain them. Judgment of High Court reversed.

Rajcoomar Roy v. *Gobind Chunder Roy,* 19 I A 140 and *Kumar B. Roy* v. *Secretary of State for India,* 44 I A 104 : 32 M L J 505 referred to.

Secretary of State for India v. *Maharajah of Burdwan,* 48 I A 565 : 42 M L J 61 applied.

Appeal from a decree of the High Court of Judicature at Fort William, Bengal (15th March, 1920) affirming the decree of the Additional Subordinate Judge of Backergunj (27th July, 1918) in Suit No. 19 of 1918.

The suit was brought by the respondents against the Government for a declaration that certain alluvial lands hereinafter mentioned are within the ambit of Mahal Debnathpur, of which they held a settlement from Government, and for the cancellation of orders of the Collector, affirmed by the Board of Revenue, assessing certain revenue therein.

The facts appear sufficiently from the Judgment of their Lordships. The Additional Subordinate Judge (K. K. Sen, Esq.) by his Judgment of the 27th July, 1918, allowed the

*P C Appeal No. 28 of 1922 (Bengal Appeal No. 34 of 1920. 2—5—1924.

P. C.
Secretary of State for India
v.
Roy Jatindra Nath Chowdhury.

plaintiff's claim with costs, and passed a decree in their favour declaring "that the disputed lands are included in Estate No. 4908, Debnathpur, and are not liable to be included in the Diara proceedings, and that all proceedings in connection with the Diara proceedings in respect of the lands were *ultra vires* and void." In the course of his Judgment he remarked

"Before assessment proceedings under Act IX of 1847 could be taken in this case it has to be ascertained that there has been alluvial accretions on the banks of the Baleswar. and the Sapleza outside the limits of the plaintiffs' estate after the settlement of 1870. And for this purpose a comparison of the map of 1870 with the present state of the locality is necessary. In the case in 25 C L J 487, their Lordships of the Privy Council condemned the practice of finding an excess area by super-imposition of maps.

"He (the Government Pleader) would argue that the survey as required by S. 3, Act IX of 1847, was very badly done but could not be said to have been illegally done. I am not prepared to accept this contention. Under the Government Letter No. 985 R, dated the 8th May, 1911, which approved the procedure suggested by the Board of Revenue in their letter No. 8595, dated the 1st April, 1911, after the preparation of the comparative maps, the Diara Deputy Collector had to demarcate the line on the ground before framing proposals for assessment. And under S. 63, Act V of 1875, the Board had power to frame such rules with the sanction of the Local Government. So that a demarcation on the ground by the Deputy Collector was necessary. And this was all the more important because there had been some diluvion since the Survey of 1904-05. The proceedings in this case were thus not done as required by law. The Act IX of 1847 is a taxing enactment, and the law gives finality to the Board's action only when the operations are made in a strictly legal way.

"The plaintiffs further contention is that their lease extended to whatever the Baleswar and the Sapleza went during the 99 years and so under the terms of Ex. 3 the Government could not, after the expiry of 30 years from 1839, re-survey the lands between them. This argument seems to have great force. The circumstance the plaintiffs could not withhold revenue owing to diluvion also supports this view. There is nothing in Ex. 3 to show that by the rivers Baleswar and Sapleza as described in the western and southern boundaries of the lease the position these rivers occupied at the time of the lease was meant and not any changes in their course these rivers might undergo. The area leased out was only an estimated one. This too supports the plaintiffs' case. So that the Government could not make a survey of the plaintiffs' lease-hold which extended up to the Baleswar on the west and the Sapleza on the south, since 30 years have elapsed from 1839. In this connection I should also observe that even if this view was not correct and the lease-hold be taken to extend up to where the river stood in 1856, still as there are no materials before me to show that these rivers did not occupy their present positions in 1856, it cannot be said that the lands assessed were not included in the lease. The locality is admittedly under fluvial action, and I am unable to accept the contention of the learned Government

P. C.

Secretary of State for India v. Roy Jatindra Nath Chowdhury.

Pleader that we could safely accept that the positions of these rivers during the Revenue Survey of 1862-63 were the same seven years before in 1856. The objection in the plaint is therefore sound.

"From what I have observed in connection with the contention (f) in the plaint, it follows that the disputed lands are within the plaintiffs' lease and no proceedings under Act IX of 1847 could be taken in connection therewith and the last contention in the plaint is correct."

The defendant appealed to the High Court of Judicature at Fort William, contending that

"(i) The suit is barred by limitation, having regard to the provisions of S. 24, Regulaton 2 of 1819;

"(ii) That the proceedings adopted for the purpose of assessing the lands discovered on comparison of the map of 1904-05 with Ellison's map of 1870 were strictly in accordance with the provisions of Regulation 2 of 1819, Regulation 3 of 1828 and Act IX of 1847;

"(iii) That it had never been contended up to the date of this suit that the said lands were within the lands referred to in Exs. 3 and H;

"(iv) That the onus was on the plaintiff to prove that the revenue authorities were wrong in the proceedings referred to above; and

"(v) That this suit being one under S. 10, Sub-S. 3 of the Regulation 3 of 1828, must be and ought to have been dealt with as an appeal against the decision of the Board of Revenue, dated the 20th December, 1915."

By their Judgment delivered on the 15th March, 1920, the High Court (Fletcher and Ghose, JJ.) following their Judgment dated 22nd May, 1918, in *Secretary of State for India in Council* v. *Maharaja of Burdwan* (1) subsequently reversed (19th July, 1921) by the Privy Council (48 I. A. 565) held that the said lands were not assessable if they were not shown to extend beyond the middle line of the two rivers respectively. In the course of their Judgment they remarked as follows:—

"Before dealing specifically with the other points urged on behalf of the appellant, it may be useful to indicate once more the nature of the present suit. The contention on behalf of the plaintiffs is that the entire proceedings for the assessment of lands with revenue in the present case are a nullity. This resolves itself into the question—Is Act IX of 1847 applicable at all in the case of a lease of lands in the Sunderbans on the terms and conditions set out in Exs. 3 and H, or is not the relation between the grantor and the grantee regulated by the terms of the contract between the parties, subject to the provisions of Regulation XI of 1825.

"Under Act IX of 1847 it must be shown that land has been added to any estate paying revenue directly to Government. It is true that Mahal Debnathpur is registered in the Backergunj Collectorate as bearing towzi No. 4908, but we must look into the circumstances of the origin of the grant. We are of opinion, having regard to the position of Government as owner

1. (1918) I L R 46 C 390.

P. C.

Secretary of State for India v. Roy Jatindra Nath Chowdhury

of the Sunderbans and to the terms and conditions set forth in the governing documents, Exs. 3 and H, that the grantee *in this case* cannot be said to be the holder of an "estate paying revenue directly to Government." If that is so, then S. 6 of Act IX of 1847 cannot be invoked for assessing lands alleged to be additions, with revenue-payable to Government. It then becomes necessary to enquire whether the proceedings, purported to have been taken under Act IX of 1847, were themselves in order. The record before us shows that there were abundant materials before the learned Subordinate Judge for coming to the conclusion that in some respects at least the action of the Diara Deputy Collector was not above reproach.

"The question of onus is, however, immaterial now. The learned Subordinate Judge had before him the whole of the record which was before the revenue authorities, and on a full consideration of the entire record he has come to the conclusion that there was nothing in it which showed that lands outside the ambit of mahal Debnathpur had come into existence and had been added to the mahal. We have examined the record which was before the revenue authorities for ourselves, and we agree with the finding of the learned Subordinate Judge.

"It is next said that it had been admitted by the plaintiffs in the course of the proceedings under Act IX of 1847 before the revenue authorities that there had been accretions outside the lands mentioned in Exs. 3 and H. The evidence is not very clear on this point ; but such as it is does not, in our opinion, prove affirmatively that there was any such admission on the part of the plaintiffs before the revenue authorities. The point was clearly taken by the plaintiffs before the Diara Deputy Collector, and it does not appear that it was abandoned at any time. It is not known that the rivers Baleswar and Sapleza at the time of the grant in this case were public navigable rivers. In the absence of any evidence to that effect, having regard to the boundaries of the land demised in this case, it would follow (see 22 S. W. N. 872) that the boundaries on the south and the west lay on, and extended to, the middle of the two rivers mentioned above. It is not shown whether the alleegd additional lands were within the limits just indicated. On all these considerations, we are unable to dissent from the view taken by the learned Subordinate Judge. If there are additional lands outside the limits just referred to, it will be open to the defendent to take proceedings under Regulation 11 of 1825.

"It is lastly urged that the matter ought to have been dealt as if it were a regular appeal from the decision of the Board of Revenue. We are unable to assent to this view. The suit was one for a declaration that the proceedings under Act IX of 1847 were a nullity. That being so, it is difficult to say that it should have been treated as a mere appeal from the decision of the Board of Revenue."

The defendant then appealed to His Majesty in Council.

Dunne, K. C. and *Kenworthy Brown* for appellant.

De Gruyther, K. C. and *Dube* for respondents.

2nd May, 1924. The Judgment of the Board was delivered by

P. C.
Secretary of State for India v. Roy Jatindra Nath Chowdhury.
Lord Shaw.

Lord Shaw :—This is an appeal from a decree dated the 15th March, 1920, of the High Court of Judicature at Fort William in Bengal, which affirmed a decree dated the 27th July 1918, of the Additional Subordinate Judge of Backergunj.

The plaintiffs are Roy Jatindra Nath Chowdhury and Roy Harendra Nath Chowdhury.

They instituted this suit on the 30th January, 1917, after due notice, against the Secretary of State for India in Council, contesting the legality of the assessment imposed in the course of an alleged Diara Survey on lands in the villages of Amragachi Hagalpati and Nizamia Gopekhali in the district of Backergunj.

These villages are part of an estate called Debnathpur bearing towzi No. 4908 of the Backergunj Collectorate owned and possessed by the plaintiffs. The plaintiffs' title to this estate is undisputed, and its earlier history is set forth in a Rubokari of the Sunderbans Commissioner of the 15th July, 1872.

On the 1st September, 1839, a grant was made by the Government to Debnath Roy, benamidar for the plaintiffs' predecessors in title, of a tract of the jungle and forest land then known as Tushkhali, but later as Debnathpur. The grant was an ijara lease for 20 years, and was rent free.

Debnath Roy, taking advantage of rules recently framed by the Government, obtained a grant on the 17th November, 1856, of the portion of waste land in the Sunderbans estimated to contain 34,000 bighas, described as Lot or Abad Debnathpur, shown in Captain Hodge's map, and bounded on the south and west by the Sapleza and Baleswar rivers respectively. The transaction was evidenced by a pottah and a kabuliyat (Exhibit 3). The grant was at a progressive rent for a term of 99 years, to take effect from the 1st September, 1839, and power was reserved to the Government to make a survey and measurement at any time between the twentieth and thirtieth years from that date to ascertain the area of the land granted and to calculate the stipulated revenue. In the course of a survey of the leased lands directed by the Commissioner of the Sunderbans in 1858, a map was prepared in or about 1863, and it was determined that the grant included an area of only 14,505 bighas 5 cottahs. This led to a litigation (aftermentioned), as the result of which a doul, of 9th April, 1870

(Exhibit H), was executed in favour of the plaintiffs' predecessors in title of 33,441 bighas 17 cottahs 7 chittacks of land known as Debnathpur for the remaining 68 years of the 99 years' lease. In 1870, Mr. Ellison, in the course of a survey, prepared a map (Exhibit J) in which the plaintiffs' mahal is depicted. The plaintiffs have been paying revenue in accordance with the arrangement, and their mahal has been numbered towzi No. 4908.

On the 2nd October, 1900, the Government issued five separate notifications. By No. 1959 T. R., the Lieutenant-Governor, in exercise of the powers conferred upon him by S. 101 (1) of the Bengal Tenancy Act as amended and with the previous sanction of the Governor-General in Council, directed that a survey should be made and a record of rights prepared in respect of all lands included within the external boundaries of Thanas, Banphal, Nalchiti, Barisal, and Backergunj in the district of Backergunj, with certain exceptions therein specified. By notification No. 1960 T. R., under the powers vested in him by S. 3 of the Bengal Survey Act V of 1875, the Lieutenant-Governor ordered that a survey be made of the lands in Thanas, Barisal, Backergunj, Banphal and Nalchiti, and that the boundaries of estates, tenures, mouzas and fields be demarcated in lands to be surveyed. By Notification No. 1961 T. R., under S. 4 of the same Act, Mr. Beatson-Ball was appointed to be the Superintendent of Survey for the purpose of carrying out the survey and demarcation of boundaries ordered in Notification No. 1960 T. R. By Notification No. 1962 T. R., under the same section, Babu Peari Mohan Basu was appointed to be an Assistant Superintendent of Survey for the same purpose. And by Notification No. 1967 T. R., under the powers conferred upon him by S. 3 of Act IX of 1847, the Lieutenant-Governor ordered that a new survey be made of the lands falling within the district of Backergunj which were situate on the banks of rivers and on the shores of the sea, and that new maps be prepared according to such survey. By two later notifications of the 27th October, 1902, and the 14th November, 1903, Mr. Bedford was appointed extra Assistant Superintendent and Mr. Beatson-Ball was again appointed Superintendent.

As already stated in 1900 the Government decided to make a Revenue survey of the Backergunj district in accordance with the provisions of the Bengal Tenancy Act (VIII of 1885).

P. C.

Secretary of State for India v. Roy Jatindra Nath Chowdhury.

Lord Shaw.

Whilst the Revenue survey was proceeding—itself a work of great labour, minuteness and complexity—it was considered desirable to make a survey also of the alluvial accretions that had taken place to the north and east of the two rivers—Sapleza and Baleswar, by the recessions of the rivers between the years 1872 and 1900. The entire proceeding is set out in considerable detail in the final report of the Diara Commissioner (p. 30 of Pt. III)). This is an important document which requires full consideration to judge whether the Revenue authorities acted in accordance with the law or not in carrying out the Diara measurements :—

"It was originally intended" says the report "that the Diara survey should be carried out concurrently with the preparation of the Record of Rights in the district and by notification No. 1967 T. R. dated the 2nd October, 1900, published in the *Calcutta Gazette* of the 10th October, 1900, a new survey was ordered of the lands situated on the banks of the rivers and on the shores of the sea within the district of Backergunj according to the provisions of S. 3 of Act IX of 1847. During the preparation of the Record-of-Rights, it was however, found that the Settlement Officer's hands were too full to take up this additional work, which the Diara survey of 1879-1881, confined only to the Ganges and the Meghna rivers, had shown to be of considerable complexity, and it was then decided to postpone the Diara operations until after the final publication of the Record of Rights. The final publication was complete of the permanently settled portion of the District early in 1908 and the Collector in his letter No. 216 K. M., dated the 11th May, 1908, to the Commissioner of the Dacca Division proposed the initiation of Diara proceedings in the district."

It appears to have taken eight years for the completion of the Revenue Survey. Then the Diara Survey was taken in hand. On its completion certain notices were issued by the Diara Deputy Collector to the plaintiffs. That of 4th July, 1914, will be hereafter cited.

It has to be borne in mind upon the one and only substantial question, namely, whether alluvion had taken place, that no doubt was or is thrown upon that as a matter of fact.

Nor, further, was any doubt suggested upon the proposition that emergent lands should certainly and naturally and under the statutes be lands from which Government revenue should be derived. The objections made on a variety of points, and with much minuteness, were that the correct procedure to enable such revenue to be imposed was defective, and that, consequently, up to date, the lands stood free from taxation.

P. C.

Secretary of State for India. v. Roy Jatindra Nath Chowdhury.

Lord Shaw.

On the 4th July, 1914, the following notice was sent to the plaintiffs by the Diara Deputy Collector :—

"Whereas by virtue of Government Notification No. 1967 T. R., dated the 2nd October, 1900, issued under S. 3 of Act IX of 1847, a new map has been prepared for the lands of mouzah Amragachia Hogalpati, No. 3500, on the bank of the Sapleza River in thana Matbaria and the said map has been compared with the Revenue survey map and it appears from such comparison that the undermentioned area has accreted to mahal Debnathpur, No. 4908, in the said mouzah."

Then it is added :—

"Be it further known that if there be any objection to this procedure the same should be filed within fifteen days from the date of receipt of this notice."

No objection appears to have been filed. The Diara Collector accordingly made his order for the assessment of the accreted lands on the 22nd October, 1914. The objectors (the plaintiffs) applied for time (apparently for further representation) which was allowed three times. But they appear to have done nothing, and the order for assessment was finally enforced on the 2nd February, 1915. The plaintiffs thereupon executed a kabuliyat simply stating that they would bring a suit in the Civil Court in respect of the said Diara lands and that they executed the kabuliyat under protest.

By a further notice of the 11th February, 1915, it was stated that it had been found, on a comparison with the settlement map of 1870, that smaller areas had formed as Diara accretions. This correction was based upon the fact that it had been discovered that certain diluvion had taken place, reducing the extent of the emergent or alluviated lands. It was accordingly just and proper that the assessment should proceed upon the extent thus corrected. The parties were thus joining issue upon the fact (1) of alluvion and its extent, and (2) whether, notwithstanding alluvion, the emergent lands were assessable in law or were already assessed as within the existing mahals.

Objections were filed by the plaintiffs, but they were disallowed successively by the Deputy Collector, the Collector, and the Board of Revenue.

Revenue was accordingly assessed on the lands alleged to have accreted, and the plaintiffs executed under protest kabuliyats by which they undertook to pay this revenue.

P. C.

Secretary of State for India v. Roy Jatindra Nath Chowdhury.

Lord Shaw.

The plaintiffs then instituted this suit in the Court of the Subordinate Judge of Backergunj, contesting the propriety and legality of this assessment. They allege in their plaint that "no new survey was made of any land on the banks of the rivers Sapleza and Baleswar in accordance with Government Notification No. 1967 T. R., dated 2nd October, 1900, issued under Act IX of 1847, and that no map was prepared under the said Act." Therefore they contended, all the operations in connection with the Diara proceedings were *ultra vires* and void.

The defendant's answer to this in his written statement was that new maps of mouzas Amragachia and Nizamia on the banks of the two rivers "were prepared in the course of the District Settlement operations," and that from comparison and relay of these maps and the Revenue Survey maps, as well as the Settlement map of 1870, it appeared that land had been added to towzi No. 4908, Abad Debnathpur. Other pleas were advanced to which it is not necessary to refer at this stage. The fourth issue framed is in these terms :—

"Is the Diara proceeding valid and legal, and is it liable to be set aside ?"

On the 27th July, 1918, the Additional Subordinate Judge of Backergunj pronounced judgment in the plaintiffs' favour and declared that all operations in connection with the Diara proceedings in respect of the lands in suit were *ultra vires* and void. The Court's decree was in accordance with the judgment.

An appeal from this decree was preferred by the defendant, but it was dismissed by the High Court on the 15th March, 1920. From this decree of dismissal the preesnt appeal has been preferred.

Numerous points have been raised in the course of the litigation, but with one exception they do not call for more than passing notice.

The plea of limitation has not been pressed, for the defendant seeks a decision on the merits and, in particular, on the legality of the assessment.

The plaintiffs' contention that R. 745 of the Bengal Settlement Manual was expressly incorporated in their lease cannot be sustained, nor is there any force in their argument that this

P. C.

Secretary of State for India v. Roy Jatindra Nath Chowdhury.

Lord Shaw.

rule was otherwise a bar to assessment proceedings even if legally initiated.

Equally ineffective is the contention that a survey after the thirtieth year from its commencement was in contravention of the terms if the lease ; the survey proposed was of land not comprised in the lease. For this reason, too, the provision in the lease defining the rate of revenue has no application.

The High Court's view expressed in the forefront of their judgment that ma hal Debnathpur is not, as Act IX of 1847 requires, " an estate paying revenue directly to Government, " is obviously erroneous, as is its ground of decision on the position of the lands in dispute and the character of the rivers Baleswar and Sapleza.

With the exception of the one point about to be noted their Lordships have now discussed all the objections that were dealt with in the course of a minute and protracted argument, and they are of opinion that these objections fail. As already mentioned it is not denied that considerable accretion of land by alluvion did in fact occur. Nor is it denied that the legislation upon this subject, including Act IX of 1847, will fail in its main object unless such lands be subjected to assessment.

Their Lordships desire to make it clear, however, that the proceedings of the assessing authorities may be still subject to being quashed in the ordinary Courts of law if they have been tainted by fundamental irregularity. Their Lordships say so in view of the provisions of S. 6 of the Act of 1847. That section is in the following terms :—

"Whenever on inspection of any such new map it shall appear to the local revenue authorities that land has been added to any estate paying revenue directly to Government, they shall without delay assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their proceedings forthwith to the Board of Revenue, whose orders thereupon shall be final."

It appears to their Lordships that it is a convenient and proper procedure that in an eminently practical matter, affecting measurements, surveys and maps of localities, with which the assessing officials on the one hand and owners on the other have presumably intimate local knowledge, such objection should be tabled to, and considered and reported upon by, the Board of Revenue. The words of this statute imposing finality upon the orders of the Board of Revenue in such a

P. C.

Secretary of State for India v. Roy Jatindra Nath Chowdhury.

Lord Shaw

situation appear to their Lordships not only to be imperative but most salutary.

Two conditions, however, must be noted ; the first is that mentioned, viz., that fundamental irregularity, that is to say, a defiance of or non-compliance with the essentials of the procedure would still give ground for questioning the proceedings in a Court of law. The second proposition is that the burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it. Unless this last rule be adhered to it is manifest that the way will be opened to endless objections to procedure, even though these are substantially on questions of fact, and the object of the statute, namely, the assessment of lands, will thereby fail.

To these two conditions a third, by way of supplement, may be added, namely, that it is not sufficient to submit in a Court of law that, upon the documents before the Board of Revenue, doubts arise as to whether this, that, or the other detail of investigation should have been set to rest more clearly in the course of the administrative procedure. If such doubts arise upon points of fact, the Board of Revenue is competent to deal with them and is, further, the proper Court before which they should be stated. In order that the doubts should be promptly set at rest, it may have to be on the ground itself. Such is the proper function of an administrative body.

All other objections having been dealt with, the one which remains is set out in Article 7 of the plaint in the following terms :—

"That actually no new survey was made of any land on the banks of the rivers Baleswar or Sapleza in accordance with Government notification No. 1967 T. R., dated 2nd October, 1900, issued under Act IX of 1847, and that no map was prepared under the said Act."

This objection is in two parts, first, that there was no new survey, and, second, that there was no map. On these subjects the two witnesses are the Diara Deputy Collector, Hara Kishore Biswas himself and Peari Mohan Hazra, the surveyor who was in service in the Diara office under the Deputy Collector. The result of the evidence is to leave no doubt upon these two points, namely, that there were previous maps to go by, and that the alluviated land was visited and surveyed in fact. The testimony of these witnesses makes that clear beyond question. The survey of 1862-3 and the

P. C.

Secretary of Stat- for India v. Roy Jatindra Nath Chowdhury.

Lord Shaw.

maps of that date were used. Further information was obtained from the map prepared by Mr. Ellison in the year 1870, an important year in the history of this piece of ground. For a controversy had arisen which resulted in litigation under decree of the High Court dated 11th March, 1868, establishing Debnath Roy's right to hold 33,441 bighas. A map called the Ellison map was made at the time, and, following these proceedings, on the 9th April, 1870, the respondents' ancestors executed to the Government a doul kabuliyat, stating in detail the revenue to be paid. With these materials, namely the maps* of 1862-3 and the map of 1870, the Deputy Collector in charge of the Diara operations and his surveyor proceeded to work. He reduced the district settlement map to a 4 inch scale map, then he super-imposed it upon the reveune survey map, he himself prepared a comparative map, then he made comparisons locally " to test if the line was accurately drawn, and to find where in the locality the line stood. " He then adds details such as these :—

> "The chowkidar, panchayet and many other tenants were present. In comparing the map in the locality and finding out how much land of each individual tenant fell within the Diara area, I at first enlarged the map of 1870 to 16 inch scale and, superimposing the cadastral survey map over it, drew out the line, and, locating it by measurement, found out the positions and drove pegs. . . I first of all tested the accuracy of the District Settlement map and found it correct. I was not entrusted to enquire how much land was diluviated—still, I made measurement and showed the line of diluvion in the District Settlement map and comparative maps."

Various maps appear in a book on this appeal. One of these is No. 6, which was exhibit N in the Court below, which contains the line drawn to show the lines, not only of alluviation, but of the subsequent diluviation already referred to, and the witness explains that " the lines in yellow in Exhibits N, N (1), etc., are in my hand. I put them on that occasion in the locality. I showed the Diara as also the diluvion lines on the map."

As already explained, not only had this land been previously surveyed and maps made as mentioned, but much care seems to have been taken, not only to mark the alluvion in 1904-5, but in 1914 to give the benefit to the taxpayer by a re-survey and a re-drawing so as to exclude from assessibility land subsequently diluviated.

P. C.

Secretary of State for India
v.
Roy Jatindra Nath Chowdhury.

Lord Shaw.

After a careful and anxious examination of all the facts submitted, their Lordships are quite unable to affirm that a Diara survey was not made. It is true that one map was superimposed upon another, surely a very natural thing to do when land was supposed to have between two dates undergone accretion ; but the land itself was visited and surveyed.

What remains appears to that—granted superimposition of plans—a separate map was not made of the alluviated land *per se*. That is to say, the results of the comparative map formed by inscribing the results of superimposition marked upon the maps used in that process, and when marked thus formed a comparative map, were not put upon a separate piece of paper which contained the outline of the alluviated land.

Their Lordships are clearly of opinion that all this was in the practical region eminently cognisable by the officials acting in the Revenue proceedings and eminently fit for settlement and decision by Board of Revenue. So much so is this the case that it would appear to be pretty clear that, had this objection been made then and there, the Board of Revenue would at once have ordered the separate sheet to be prepared, which was desiderated.

Passages occur in the judgment of the Court below which seem to taint with illegality or impropriety the operations of superimposition of maps. There is nothing wrong with this from the legal point of view, and from the practical point of view the Revenue Court can deal with it. In *Rajcoomar Roy v. Gobind Chunder Roy* (1) this Board said :—

"In boundary cases of this kind nothing is easier than to profound riddles which cannot be answered by merely looking at the maps or reading the statement which appears in the Record. If it were enough to show to this tribunal difficulties which the respondent's counsel cannot explain, and then to contend that his case is not proved, he would labour under an unfair amount of burden. In such cases the local Courts have advantages over the remote ones."

In their Lordships' view this language aptly applies to Board of Revenue Court proceedings, and more particularly so in view of the finality of that Board's orders under S. 6 of the Act of 1847. In the same case the following pronouncement was made :—

"They can show many difficulties of a kind which probably no amount of mapping or verbal description would avoid. *Mr. Madge's* map does not, so

1. (1892) L R 19 I A 140.

P. C.

Secretary of State for India Roy v. Jatindra Nath Chowdhury.

Lord Shaw.

far as their Lordships can see, show in terms, and on its face, the *Thackburt* line which was complained of and corrected in the mutnaza suit, nor the lands described in the plaint. But those objections were before the High Court, who were satisfied that *Mr. Madge* had shown the things required ; and, though it does not appear that *Mr. Madge* was present to explain his map, the Court could certainly have required his presence if any real difficulties had been felt on those points."

Again, their Lordships think it right to say that this language aptly applies to the Board of Revenue proceedings, and they further desire to add that, while the survey proceedings and the map proceedings had been the subject of the examination of the two officers practically and personally connected with this work, the respondents, who have resisted throughout having assessment made on these lands, did not appear as witnesses on the subject, although, in the evidence already given, it had been clearly shown that the survey had properly been in the presence of many persons named.

It would rather appear as if the whole of this point was a mere incident in a case which was essentially founded on a mistake. The respondents resisted the assessment of this increment of the estate upon grounds which this Board has recently found to be unsound in law. They maintained, in short, that the mahal included the increment because its boundaries extended in the case of each of the rivers mentioned, namely, the Baleswar and Sapleza, *ad medium filum*. The High Court, in their judgment, erroneously treated this as a sound ground. Their judgment was pronounced upon the 15th March, 1920.

But the law applicable to this subject is to an opposite effect, as has been settled in the case of *The Secretary of State for India* v. *The Maharajah of Burdwan* (2). That case was *a fortiori* of the present, and it was held that the Government is entitled to Public Revenue under Act IX of 1847, from chars formed in a non-navigable river, even where it flows through a permanently settled Zamindary, as well as up to the middle line of the river where that is the boundary of the Zamindary, and this even where it appears that the river bed was part of the permanently settled Zamindary. Against this judgment of the Board, delivered by Lord Cave, no argument could, of course, be raised at their Lordships' Bar.

2. (1921) L R 48 I A 565 : 42 M L J 61.

P. C.
Secretary of State for India v. Roy Jatindra Nath Chowdhury.
Lord Shaw.

That was the matter of substance, and fundamental, because if the respondents' mahal included the alluvion as already assessed lands, the fresh assessment thereof was necessarily illegal. That fundamental objection having been got rid of, however, the respondents were, of course, within their rights in raising the other points now dealt with, including that just described as incidental. Upon that incidental point, however, whether there was or was not a new survey map prepared in such a way as to satisfy the requirements of the Act of 1847—it must be repeated that it lies upon the respondents challenging the assessment proceedings to prove the fundamental illegality of which they complain.

As the result of a long and searching argument, the most that can be said is that the point may have been left not entirely cleared up. On principle, and on authority, this is entirely insufficient. The appellants have merely propounded a riddle. The case of *Kumar Basanta Roy* v. *Secretary of State for India* (3) has been cited by the Additional Subordinate Judge as an authority condemning the practice of finding an excess area by super-imposition of maps. Their Lordships do not read the judgment in any such sense, but the passage of Lord Sumner's pronouncement, which is apparently referred to, has, in the view of the Board, a direct bearing of another kind upon the present proceedings. It is to the following effect :—

"The respondents' argument rested on three points : First that since 1886 they had been, as they said, in possession of certain portions of a char known as char Raninuggur No. 1, that by superimposing the ameen's 1886 map on his survey of 1906 it would be seen that part of the area disputed in this action, although claimed as part of char Raninuggur No. 2, really fell within char Raninuggur No. I, and that there had been a confusion of mauza Jirat, which lay in the north of the disputed area, with an area called char Jirat outside of it and to the south, some miles away. Their Lordships' Board has had occasion before now (*Rajcoomar Roy's Case*) to deprecate the practice of 'propounding riddles of this kind,' and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. After the best consideration that they could give, their Lordships are clear on one point only, namely, that this case was not made at all at the trial, and is not made out now."

The Board is of opinion that these observations fitly apply also to proceedings in the Board of Revenue, a Board specially charged with the settlement of disputes as to bound-

3. (1917) L R 44 I A 104 : 32 M L J 505.

P. C.

Secretary of State for India v. Roy Jatindra Nath Chowdhury.

Lord Shaw.

aries and changes therein and other matters of fact and procedure which are capable of being most satisfactorily treated with all the advantages of local and special accumulated experience. It has been noted accordingly that objections were taken and discussed before the Collector of Backergunj, and, after his disposal thereof, two petitions of appeal were presented by the respondents to the Board of Revenue on the 31st March, 1915, and 19th November, 1915, the latter being confined to the Sapleza river. Every conceivable point seems to have been taken, but, in the course of the 12 paragraphs of statement, and the five reasons for appeal, this point as to the alleged absence of a proper map is not taken. For the reason about to be given, their Lordships express little surprise at this. For the Record of the proceedings of the Board of Revenue appear to disclose, not only that such an objection is ill founded on fact, but must have been known to be so by the plaintiffs' local representatives appearing for the purpose before the Revenue Board.

On the 22nd October, 1914, a long entry appears in the order sheet of the objection existing in the Diara Settlement office, and point (*b*) thereof is in the following terms :—

" By virtue of Government Notification No. 1967 T. R., dated the 2nd October, 1900, a survey of the lands which are situated on the banks of the rivers within the district of Backerganj was made in the course of the District Settlement operations. An index map showing the surplus accretions was prepared by the Diara Officer. The portion diluviated since the District Settlement has also been shown in the comparative map after local enquiry."

The argument did not go so far as to suggest that this record is in any way impeachable. In these circumstances the map point may be said not to be left in doubt, but to disappear.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside and the suit dismissed with costs here and below.

Solicitor for appellant *Solicitor, India Office.*

Solicitor for respondents *Douglas Grant.*

A. D. M. *Appeal allowed and suit dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, LORD CARSON AND SIR JOHN EDGE.

(On appeal from the High Court of Judicature at Lahore.)

Ganga Ram and others *Appellants** (*Defendants*)

v.

Natha Singh and others *Respondents* (*Plaintiffs*).

P. C.

Ganga Ram *v.* Natha Singh

Mortgage—Interest due under—Charge on property in respect of—Rule—Exception—Deed displacing general rule—Construction.

The general rule is that the mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate ; and it is most important that this general rule should not be shaken in any particular.

Held, that there was nothing in the mortgage deeds in question in the case which served to displace the general rule.

Judgment of High Court reversed, and that of the Senior Subordinate Judge restored.

Alia Khan v. *Kanshi Ram,* 45 Punjab Record, (1913), p. 176 referred to.

Appeal from a decree of the High Court of Judicature at Lahore (10th December, 1920) which modified a decree of the Senior Subordinate Judge of Ferozepore (31st March, 1916).

Diwan Singh executed the following mortgages :—

(*a*) On the 18th June, 1888, a usufructuary mortgage of 332 kanals of land in Mouza Salina for Rs. 1,800 in favour of Nathu Mal (son of Suba Mal) and Ganga Ram (son of Ramjas).

(*b*) On the 25th August, 1888, a usufructuary mortgage of 560 kanals of land in Mouza Salina for Rs. 5,500 in favour of the said Nathu Mal and Sita Ram (son of Ramjas). Each of these mortgages provided that the mortgagees were to cultivate the land, enjoy or realize the produce, and pay the Government Revenue.

(*c*) On the 26th June, 1890, he borrowed a further sum of Rs. 800 from the above-named Nathu Mal, Ganga Ram, and Sita Ram, and executed in their favour a mortgage of the said 892 kanals of land which provided that the mortgagor was to pay annually interest at the rate of Rs. 1-6-0 per mensem, and if interest was not paid, compound interest was to be charged.

*P C Appeal No. 93 of 1923 (Punjab). 12th and 13th May, 1924.

P. C.
Ganga Ram
v.
Natha Singh.

(*d*) On the 25th October, 1890, he borrowed a further sum of Rs. 800 from the said three persons on a further mortgage of the same 892 kanals of land. Interest and compound interest were to be paid at the rate of Rs. 1-8-0 per mensem.

(*e*) On the 1st April, 1891, he executed a further usufructuary mortgage of 12 kanals of land in Mouza Salina for Rs. 37-8-0 in favour of Nathu Mal and Ganga Ram. The mortgagees were to take the produce of the land and pay Government Revenue.

On the 24th June, 1914, the plaintiffs, as representatives of Diwan Singh deceased, instituted the present suit in the Court of the District Judge of Ferozepore against the mortgagees for redemption of the lands mortgaged in the first four mortgages. On the 12th January, 1915, the plaintiffs filed in the Court of the Subordinate Judge of Ferozepore, where the case was then pending an amended plaint asking for redemption of all five mortgages which they claimed they were entitled to on payment of the principal moneys advanced, *i. e.*, Rs.8,937-8-0, and they pleaded that

> "the conditions of interest entered in the additional previous mortgage-deeds dated the 26th June, 1890 and the 25th October, 1890, are void, because they were against law, penal and were made under undue influence."

The defendants by their Written Statement of Defence filed on the 10th October, 1914, pleaded that, on redemption, they were entitled to be paid interest and compound interest on the mortgages dated the 26th June, and 25th October, 1890, in addition to the principal mortgage moneys, and that

> "Natha Singh and Attar Singh, plaintiffs, had already instituted a declaratory suit regarding the four mortgage-deeds referred to in the plaint. It was dismissed by the Court of the District Judge, Ferozepore, on the 8th May, 1893. It was also dismissed by the Chief Court of the Punjab. The said alienations were maintained under the order dated the 2nd November, 1898. No objection can now be raised."

The Subordinate Judge (Saadullah Khan, Esq.) delivered Judgment on the 31st March, 1916, holding that the mortgages were executed by Diwan Singh

> "deliberately with a full knowledge as to the conditions of interest and compound interest, and interest is to be a charge on the land, and that it must be paid before redemption can take place."

He, therefore, decreed the plaintiffs' claim for redemption on payment of Rs. 19,800 interest, *plus* Rs. 8,937-8-0, the principal mortgage debt, and ordered that

P. C.

Garga Ram
v.
Natha Singh.

"future interest is to be charged at the rate of Rs. 6 *per cent.* On the amount due on the two *Zarmazid names,* viz., on Rs. 800 *plus* 800 *plus* 19,800 (equals 21,400) and possession is to be given on *Nimani* following payment. Defendant's costs to be paid by plaintiff."

The plaintiffs appealed against the said decree to the High Court, contending that they were not liable to pay interest and compound interest on the mortgages of June and October, 1890. The defendants filed cross-objections to the effect that the lower Court was wrong in not allowing future interest at the contractual rates. The High Court (Chevis and Raoof, JJ.) on the 10th December, 1920, allowed the plaintiffs' appeal with costs, holding, that the mortgages were redeemable on payment of the principal debt, *viz.* Rs. 8,937-8-0, and that the interest and compound interest were not chargeable on the lands mortgaged. In the course of their Judgment, the learned Judges said

"The first deed contains the following words :—"*Man mukir rahin ath sau rupaya ka sud ba sharah Rs.* 1-6-0 *har sal murtahinan ko wasul de dia karunga. Jis kadar rakan sud baki rahega uska ba sharah mukarrar dunga. Man mukir rahin jab zar-i-ran sabika wa hal murtahinan ko wasul dunga arasi marhuna fakurrahn kara lunga.*" The terms of the second deed are to the same effect, but we note that in this deed the mortgagor agrees to pay back the sum of Rs. 800 with interest in three instalments, and the Clause regarding compound interest comes at the end of the deed and after the clause providing that redemption can be made on payment of the "*zar-i-rahn sabika wa hal*". The decision of the question depends on whether we regard the term *zar-i-rahn* as meaning the principal sum for which the land was mortgaged or the whole amount due on the mortgage including interest at the time of redemption. The first case cited on behalf of the appellants is 45 P R 1913. This was a case in which land was mortgaged for Rs. 1,300. The mortgagees were put in possession and produce was to be regarded as equal to the interest on Rs. 650 while interest on the remaining Rs. 650 was to be charged at Rs. 1 per cent. per mensem. This interest was to be paid annually and in default compound interest was to be charged at the same rate. No period was fixed for redemption, but the mortgagors were at liberty to redeem the land in the month of Har of any year on payment of the "*zar-i-marhuna.*" As regards the recovery of the interest payable on Rs. 650 it was further stipulated that the mortgagees would have the option either to charge compound interest or to recover the same from the mortgagors by suit. The learned Judges noted that the phrase *zar-i-marhuna* was used several times during the deed and in some parts of the deed the phrase clearly refers to the principal sum. They held that the land could be redeemed on payment of the principal sum only. One thing we regard as beyond all doubt and that is, that there is no difference in meaning between the two phrases "*zar-i-rahn*" and "*zar-i-marhuna.*" 73 P. R. 1892 is a similar case. 121 P. R. 1894 is cited on behalf of the respondents. It is there laid down that the general rule is that the

P. C.

Ganga Ram *v.* Natha Singh.

mortgagee, in the absence of any contract to the contrary, is entitled to treat interest due under the mortgage as a charge on the estate. We fully agree with this dictum, but the question before us is whether, in this particular case, the deeds do not themselves provide for redemption on payment of the principal only. It would have been perfectly easy for the respondents to have had inserted in the deeds that the payment of interest should be a condition precedent to redemption. It would have been perfectly easy to have made the phrase of redemption run :—" *jab zar-i-rahn sabika wa zar-i-rahn hal asl mai sud wasul dunga fakur-rahn kara lunga.*" We have to consider the terms of the deed and to decide to the best of our ability what the parties meant by those terms. It is easy to argue that the mortgagees could not have intended to allow redemption without payment of interest and their omission from the beginning up till now to recover interest by suit is a clear indication that they have all along regarded interest as a charge on the land. On the other hand, had the interest been intended to be a charge on the land there was no necessity for the mortgagor to promise that he would pay interest every year. It seems to us most probable that the mortgagor never contemplated that the interest charges could not be met regularly and we do not suppose that he ever contemplated that interest and compound interest should be added on to the mortgage charge swelling the original amount of the debt from about Rs. 9,000 to a sum which would render redemption extremely expensive unless the land was redeemed within a short period. We are, therefore, of opinion that the phrase *zar-i-rahn sabika wa hal* in the two documents under consideration refers simply to the principal mortgage debt and has no reference to interest. The mere fact that in the later deed the clause as to compound interest follows the clause as to redemption in our opinion makes no difference. It is also argued that the clause in the second deed as to payment of the money with interest by instalments shows that the interest and principal were both regarded as forming part of the mortgage debt, but we are unable to see that the agreement to repay by instalments affects the interpretation of the clause as to redemption. There seems to us no difference between 45 P. R. 1913 and the present case except that in 45 P. R. 1913 there was only one mortgage, whereas in the present case the land was first mortgaged with possession for a sum the interest on which was to be set off against profits, and a subsequent charge was afterwards created which was to bear interest.

"We accept the appeal and give the plaintiffs a decree for redemption of whatever share in the mortgaged land is still owned by them on payment of a proportionate share of the principal debt, *viz.*, Rs. 8,937-8-0. The plaintiffs will get costs in both Courts in proportion to their share."

The defendants' cross-objections were dismissed by the High Court, and they accordingly appealed to His Majesty in Council.

Wallach for appellants.

The respondents did not appear.

13th May, 1924. The Judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN :—In this case the plaintiffs sue for redemption of five mortgages. Two of those mortgages, the

P. C.
Ganga Ram
v.
Natha Singh.
Lord
Dunedin.

earlier two in date, were usufructuary mortgages ; the other mortgages were not usufructuary, but with regard to the next two—for as to the fifth one there is no question at all—there is a recital that interest is to be paid upon the sum borrowed.

Now, the whole point of the case is whether that interest in this third and fourth mortgage does or does not form a charge upon the property. The learned trial Judge held that it did form a charge on the property, and therefore granted redemption only upon terms of paying the principal sums and the interest. That decree was reversed upon appeal, and the High Court allowed redemption upon payment of the principal loan only. Their Lordships find that in the judgment of the learned Judges in the High Court they state with perfect correctness what their Lordships apprehend is undoubted law. They say: " The general rule is that the mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate."

Their Lordships have been entirely unable to find anything in the deeds which would serve to displace that general rule. The learned Judges seem to have gone particularly upon the case of *Alia Khan* v. *Kanshi Ram* (1). It is, perhaps, a little difficult to follow that case, as the material parts of the deed in question are only printed in the vernacular; but it is perfectly clear from the Report, even as it stands, that there were various mentions of the sum to be redeemed in different parts of the deed, and that consequently the deed itself formed, so to speak, a glossary for the particular meaning of the word that was used when you came to the repayment clause. Nothing of this sort is here. The mortgages are expressed with great brevity, and, indeed, if there is anything at all, it rather seems, such as it is, to point the other way, because especially in the fourth mortgage there is this expression: "I shall without objection pay the additional mortgage money with interest in the following instalments." That certainly points much more in favour of the general rule than against it, but it is quite enough to say that there is nothing to be found here which disturbs the general rule, which, it is most important, should not be shaken in any particular.

It is impossible to restore in terms the decree of the trial Judges, because it was discovered in he course of the hearing before the High Court that the plaintiffs were not in right in the

1. (1913) P R 176 (Civil Judgments).

P. C.

Ganga Ram
v.
Natha Singh.

Lord
Dunedin.

whole of the mortgages, and accordingly the judgment of the High Court ran "We give the plaintiffs a decree for redemption of whatever share in the mortgaged land is still owned by them on payment of a proportionate share of the principal debt."

There ought, therefore, to be a declaration that it is not only a share of the principal debt, but also interest must be paid before redemption, and the case will have to go back in order that the decree may be worked out on those terms.

Their Lordships, therefore, think that the appeal must be allowed, with costs here and below, and they will humbly advise His Majesty accordingly.

Solicitor for appellants : *E. Dalgado.*

A. de M. *Appeal allowed.*

PRIVY COUNCIL

PRESENT :— LORD PHILLIMORE, LORD BLANESBURGH, LORD DARLING, SIR JOHN EDGE AND MR. AMEER ALI.

(On Appeal from the High Court of Judicature at Fort William, Bengal.)

The Imperial Tobacco Company of India, Ltd.... *Appellants**

v.

Albert Bonnan and Bonnan & Company *Respondents*

P. C

The Imperial Tobacco Co. of India, Ltd.
v.
Bonnan and Bonnan & Company.

Trade-mark —Infringement —Importer of goods manufactured by another —Reputation of —If can be acquired—Infringement of right of importer—Action for—Maintainability —Manufacturer being sole importer— Sale in competition with— If and when actionable— Trade-mark—Passing off of goods —Principles of Jurisprudence as to—Applicability in India.

In 1901, W. D. & H. O. Wills (manufacturers of "Gold Flake" cigarettes) amalgamated with other similar companies and formed one company known as the "Imperial Tobacco Company (of Great Britain and Ireland), Ltd." to whom it assigned its goodwill and trade-marks. In 1902, the new company agreed with the "American Tobacco Company" that the latter should confine its trade to the U. S. A. and certain islands, and the former to Great Britain and Ireland, and that the two companies together should form a third ("The British-American Tobacco Company, Ltd.") which should confine its trade to the rest of the world not included in the territories of the first two companies. "The British-American Tobacco Company, Ltd." was then incorporated, the

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*P C Appeal No. 142 of 1923. 13th May, 1924.

P. C.

The Imperial Tobacco Co., of India. Ltd. *v.* Bonnan and Bonnan & Company.

other two companies assigned to it their business, goodwill and trade-marks outside their respective territories, and mutual respective covenants to the aforesaid effect were entered into by the three companies. Subsequently, "The British-American Tobacco Company (India), Ltd." was incorporated to act as distributors in India of "The British-American Tobacco Company, Ltd." and by an agreement (which was not, however, followed by a proper assignment) made the 1st September, 1910, between the British-American Tobacco Company, Ltd. of the first part, the British-American Tobacco Company (India), Ltd., of the second part, and the Imperial Tobacco Company of Inida, Ltd., (the appellant company) of the third part, the last named company agreed to buy the goodwill, business, rights, trade-marks and other assets of "The British American Tobacco Company, Ltd." in *inter alia* India and of "The British-American Tobacco Company (India), Ltd.," together with the sole right to use there their name or names, and the names of all firms and companies which they had acquired.

Packets of "Gold Flake" cigarettes having the distinctive appearance and trade-marks of W. D. & H. O. Wills were manufactured by "The British-American Tobacco Co., Ltd.," and, between 1902 and 1910, imported and distributed in India by "The British-American Tobacco Co., (India) Ltd.," and since 1910 by the appellant company. In 1921, the respondents purchased about 21 1|2 millions of such cigarettes (made by "The British-American Tobacco Co., Ltd." and sold to the Government of the United Kingdom) from the surplus war stores liquidated by the British Army Canteen authorities in England, subject only to a stipulation that they were not to be re-sold in the United Kingdom, and they despatched and sold part of these in India.

In an action by the appellant company for an injunction restraining the respondents from so selling these cigarettes which were an alleged infringement of their trade-mark as importers and sole vendors thereof, *held,* (affirming the judgment of the trial Judge and High Court on appeal in Calcutta) that (1) neither by assignment nor by reputation had the appellant company any title to the trade-marks in India as alleged : *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.,* (1924) A. C. 1, referred to ; (2) there being no covenant by the respondents against selling the cigarettes outside the United Kingdom, nor any conduct on their part showing that they represented the cigarettes to be other than they genuinely were, no action lay for infringement or passing off.

It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness ; and if therefore goods, though of the same make, are passed off by competitors as being imported by him, he will have a right of action.

There is nothing to prevent a tradesman acquiring goods from a manufacturer and selling them in competition with him, even in a country into which hitherto the manufacturer or his agent has been the sole importer.

The ordinary principles of jurisprudence with regard to trade-marks and those forbidding the passing off of goods apply to India.

Appeal from a judgment and decree (10th April, 1923) of the High Court (Appellate Civil Jurisdic-

tion), Calcutta, affirming a judgment and decree (18th July, 1922) of the same Court in its ordinary Civil Jurisdiction, dismissing the appellant Company's action with costs.

The facts of the case appear sufficiently from the judgment of their Lordships.

7th and 8th April, 1924. *F. H. Maugham, K. C., Sir Duncan M. Kerly, K. C., L. B. Sebastian* and *F. E. Bray* for the appellants.

The appellant company claim title and relief on two grounds: (1) a proprietary title derived from the agreement of the 1st September, 1910, to the exclusive use in India of the trade-mark, trade-name and descriptions appearing on the labels and wrappers in which the cigarettes are issued for sale; (2) a title based on reputation, in so far as the said trade-mark, etc., denoted to buyers and consumers of cigarettes in India, not only their origin and make, but also their importation into India by the appellant Company. On the evidence, there can be no doubt or dispute as to the following facts: (*a*) The words "Wills' Gold Flake" and "Gold Flake" had at the time action brought, and for many years previously been recognised by the trade and public in India as a "trade-mark." In 1910, the appellant company had acquired by purchase (under the agreement of the 1st September, 1910) the goodwill in India of the business with which such "trade-mark" was associated and had ever since carried on the business there as successors to that goodwill. (*b*) All the cigarettes (about 100. millions) sold in India under such trade-mark since 1910 were the goods of the appellant company exclusively, having been made either by or for them, and distributed by them. Delivery of possession having under the agreement taken place on the 1st October, 1910, and the business having been paid for, transferred in fact, and since carried on, no further assignment was executed or necessary, but as a measure of precaution an assignment was executed on the 10th April, 1922, prior to the inception of these proceedings by the British-American Tobacco Company to the appellant company. (*c*) The trade-mark was also that of the appellant company, and the offer for sale of the respondents' packets was an infringement of the appellant Company's trade-mark, and a false representation that the cigarettes therein contained were those of the appellant company, and carried their guarantee. From these three facts, the conclusion was irresistible that the sale or offer of

P. C.

The Imperial Tobacco Co. of India, Ltd. v. Bonnan and Bonnan & Company.

the respondents' packets was calculated to lead to the cigarettes being passed off as the appellant Company's cigarettes. The Courts in India (Pearson, J. the trial Judge, in particular) were wrong in thinking that it was necessary to decide that the trade-mark was either a "manufacturer's mark," or an "importer's mark" or that the witnesses who stated that they relied on the name "Wills," and expected to get cigarettes made by "W. D. & H. O. Wills" militated against the appellant company's case. The effect of such evidence was not really "that what the purchaser will look to is the brand, and not the importer," but only that, while the previous purchasers of the cigarettes under the brand had created or maintained confidence in the trader (the appellant company) who controlled its use in India, there were some persons who were ignorant of the identity of that trader or of trade-history, but such ignorance was immaterial. If it was necessary or possible to ascertain how far the function performed by the appellant company as importers and distributors contributed to the reputation of the cigarettes sold in India as "Gold Flake," the evidence proved that the proper organisation of the import and distribution was a material contribution to the maintenance of reputation attaching to the trade-mark, and that reputation was the inducement to buy. The offer of the respondents' cigarettes as "Gold Flake" was a claim to that reputation, and thus a false inducement to purchasers. Lastly, the distribution to different successors in different territories of the goodwill of a business is, and has been, even under Common Law, a recognised incident of commercial life (*vide* S. 22 of the Trade Marks Act, 1905); and accordingly, the Courts in India were wrong in acting upon principles inconsistent with the possibility of such transfers, and holding the appellant company had no title to sue in India.

Hyam for respondents.

Concurrent findings of fact have been arrived at by the Trial Judge and Appellate Court in India that (1) the appellant company has acquired no such reputation as claimed as importer of the cigarettes under the trade-mark in dispute; (2) to buyers and consumers, the said "trade-mark" denoted only the fact of the origin and make of the cigarettes, and not that they were imported into India by the appellant company; (3) the respondents' cigarettes were genuine cigarettes of the manufacturers, and were in sound and saleable condition. Further, it has not been proved that the said trade-mark, with the

P. C.

The Imperial Tobacco Co. of India, Ltd. v. Bonnan and Bonnan & Company.

goodwill of the business of the manufacturers connected therewith, were effectively assigned to the appellant company, and, even if there were such an assignment, the respondents' cigarettes were genuine, and there being no false representation, there is no cause of action for "passing off."

[The following authorities were cited in the course of the argument :—

Leather Cloth Co. v. *American Leather Cloth Co., Ltd.*, 4 De. G J. & S p. 137. *Riddaway* v. *Banham*, (1896) A C 199, *Somerville* v. *Schembri*, (1889) 12 A. C. 453. *British-American Tobacco Co.* v. *Mahboob Baksh*, I L R 38 C 110. *Dental Manufacturing Co* v. *De Prey and Co.*, (1912) 3 K B 76. *Sen* v. *Oakes*, 24 C W N 155. *Richards* v. *Butcher*, 7 Patent Cases 277. *Defries* v. *Electric Co., Ltd.*, 23 Patent Cases 341. *Spalding* v. *Gamage*, (1915) 32 Patent cases 273. *Hall* v. *Borrows*, 33 L J Ch 204. *Singer Manufacturing Co.* v. *Loog*, (1882) 8 A C 15. *Pinto* v. *Badman*, (1891) 8 Patent Cases 18•. *Imperial Tobacco Co.* (*New foundland*) v. *Duffy*, (1918) A C 180.

13th May, 1924. The Judgment of the Board was delivered by

Lord Phillimore.

LORD PHILLIMORE :—Before the year 1901, the Company known as W. D. & H. O. Wills, Limited, had begun to manufacture a particular cigarette which got to be known as Gold Flake or Wills' Gold Flake, and which soon acquired a considerable reputation.

In the year 1901, W. D. & H. O. Wills, Limited, and various other companies became amalgamated into one Company called the Imperial Tobacco Company (of Great Britain and Ireland), Limited, and the whole business of W. D. & H. O. Wills, Limited, with its goodwill and trade-marks was assigned to the Imperial Tobacco Company (of Great Britain and Ireland), Limited. In September, 1902, this last-named Company made an agreement with a Company called the American Tobacco Company, by which it was agreed that the American Tobacco Company should confine its trade to the United States and certain islands, and that the Imperial Tobacco Company (of Great Britain and Ireland), Limited, should confine its trade to Great Britain and Ireland, and that these two Companies should form a third to be called the British American Tobacco Company, Limited, which should confine its trade to the rest of the world not included in the territories of the two first Companies. And accordingly the British American Tobacco Company, Limited, was incorporated ; and to it the other two Companies assigned their business, goodwill and

P. C.

The Imperial Tobacco Co. of India, Ltd. *vs.* Bonnan and Bonnan & Company.

Lord Phillimore.

trade-marks outside their respective territories ; and mutual covenants were entered into by the three Companies confining their trades to their respective territories.

At some date not specified in the record, a Company called the British American Tobacco Company (India), Limited, was incorporated to act as distributors in India for the British American Tobacco Company, Limited.

By an agreement made the 1st September, 1910, between the British American Tobacco Company, Limited, of the first part, the British American Tobacco Company (India), Limited, of the second part, and the appellant Company of the third part, it was agreed that the appellant Company should buy the goodwill, business rights and other assets of the British American Tobacco Company, Limited, in India and certain other territories, with brands, trade-marks, trade names, formulæ and recipes, and the sole right and title to use in that territory the name of the British American Tobacco Company, Limited and the names of all firms and companies which it had acquired, and also the goodwill, business rights and assets of the British American Tobacco Company (India), Limited. This agreement, however, was not perfected by an assignment. By an indenture dated the 11th April, 1922, and made between the British American Tobacco Company, Limited, and the appellant Company—but to which the other Company was not a party—the British American Tobacco Company, Limited (so far as it was concerned) performed its agreement by assigning all the premises comprised in the agreement to the appellant Company.

The Gold Flake cigarettes in question were sold at one time in tins of fifty cigarettes and afterwards in packets of stiff paper, each containing ten cigarettes. On the broad flat top of the packets appeared in bold letters, words showing that they were Gold Flake cigarettes and the name of W. D. & H. O. Wills, Bristol and London ; and on the back with a number of medals, there was an inscription in the following words :—

"Every genuine package of Gold Flake
Cigarettes has the signature thus
W. D. and H. O. Wills."

On one of the ends of the packet—if they were packets to be sold in India by the appellant Company—appeared in very small print :—

"This label is issued by the
Imperial Tobacco Co. of India, Ltd.
Registered Trade Mark.
Successors in India to W. D. and H. O. Wills
Cigarettes, made in England."

If they were manufactured by the British American Company for sale elsewhere, the words, in lettering of the same small size, were :—

"Established by W. D. and H. O. Wills, Bristol and
London, British-American Tobacco Co., Ltd.
Registered Trade Mark.
Bristol, London, Liverpool and Virginia.
Successor. Made temporarily in the U. S. A."

No reliance was placed in argument by either party upon the difference in the two inscriptions at the ends of the packets.

The only other difference between the packets to be used in India and those to be used elsewhere was that the paper for the Indian packets was of somewhat stouter material so as to afford a better resistance to damp.

Packets with this distinctive appearance and these trade-marks were manufactured by the British American Tobacco Company, Limited, and imported and distributed by the British American Tobacco Company (India), Limited, from about 1902 till the date of the agreement in 1910 ; after which date they were imported and distributed by the appellant Company. The manufacture was carried out by the British American Tobacco Company, Limited, at first in England, afterwards temporarily in the United States of America.

In the year 1921 the respondent Bonnan purchased about 21½ millions of Gold Flake cigarettes, surplus stores sold by the British Army Canteen authorities, the sale being subject to the condition that they were not to be re-sold in the United Kingdom. These cigarettes had been sold, in the first instance, to the British Canteen Authorities by the British American Company, Limited. After so acquiring them the respondent Bonnan formed the respondent Company, and the respondents shipped a large quantity of these cigarettes to India and offered them for sale there. Thereupon on the 11th May, 1922, the appellant Company brought a suit in the High Court at Calcutta, claiming an injunction to restrain the respondents from selling these cigarettes in India.

P. C.

The Imperial Tobacco Co. of India, Ltd. v. Bonnan and Bonnan & Company.

Lord Phillimore.

There being no Trade Marks Act in force in India, the case for the appellant Company was rested upon the ordinary rights of every trader to protect his property and to prevent attempts by other traders to avail themselves of his reputation to pass off their goods as his own.

The issues which were settled were accordingly addressed to these points, the more important being those numbered (1), (2), (5) and (8), which are as follows :—

"(1) Does the get-up of the cigarettes described in paragraph 7 of the plaint denote to purchasers in India that such cigarettes are imported by the plaintiff company?

"(2) Will the sale by the defendant company of cigarettes in such get-up deceive the purchasers into the belief that the cigarettes have been imported by the plaintiff company?

"(5) Is the plaintiff entitled as against the defendants either by reason of such importation or by reason of such purchase to prevent defendants from selling cigarettes with such get-up though they have in fact been manufactured by the British-American Tobacco Company?

"(8) Are plaintiffs entitled to protect their right by injunction irrespective of consideration mentioned in the first two issues?"

The case was then heard upon oral evidence by Pearson J., who found on these issues against the appellant Company and dismissed the action; and his decree was affirmed on appeal by Sanderson C. J. and Richardson J. It is from this affirmance that the present appeal has been brought.

At the trial some evidence was given on behalf of the appellant Company in order to show that it had a reputation as the sole vendor in India of Gold Flake cigarettes and that the respondents were trading upon this reputation. It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness; and if, therefore goods, though of the same make, are passed off by competitors as being imported by him, he will have a right of action.

But the evidence offered by the appellant Company was met and in the opinion of the learned Judges displaced by the evidence given on behalf of the respondents.

Thus Pearson J. said :—

"I find, therefore, upon this part of the case that the reputation of the brand of Gold Flake cigarettes in India is the reputation of the maker and not of the plaintiff Company as importers. The reputation originated in the days of Messrs. W. D. and H. O. Wills, the original manufacturers, and the efforts

of the plaintiff Company have been directed not to creating or acquiring (if such a thing is possible) an importer's reputation for themselves in the brand, but in maintaining and developing the reputation of the brand as a manufacturer's brand. The issues, therefore, dependent upon this finding are answered in favour of the defendant."

And Sanderson C. J. :—

"There is no necessity for me to refer to the evidence in detail, for I agree with the learned Judge's finding of fact. In my judgment the sole representation made by the plaintiffs' user of the covering of the cigarettes was a representation that the cigarettes were Gold Flake cigarettes manufactured by the successors of the well-known firm of W. D. and H. O. Wills. There is no evidence to justify the alleged representation (on which the plaintiffs relied) that cigarettes, bearing the said wrapper or covering, had come through a particular channel or had been imported by the plaintiffs. In the same way the defendant by using the wrapper or covering was merely representing the cigarettes as Gold Flake cigarettes manufactured by the successors of the well-known firm of W. D. and H. O. Wills, *viz.,* the British American Tobacco Company. This was a perfectly true representation, and the defendant was in no way passing off or attempting to pass off the cigarettes sold by him as the plaintiffs' goods."

And finally Richardson J. :—

"Moreover, the learned Judge, Pearson, J., before whom the case came in the first instance, has found, and, in my opinion, on the evidence rightly and conclusively found, that up to the date of the suit the Company had acquired no independent reputation as importers. Nor do they use any distinctive importers' mark."

Their Lordships see no reason to review these concurrent findings. Indeed they were not invited to disturb them as findings of fact ; but it was suggested that the learned Judges had arrived at them as mixed findings of fact and law and in so doing had erroneously applied the law.

Another way of putting the case for the appellant Company was suggested by Counsel, which was to treat the first issue as wrongly stated. It ought, it was said, to have run as follows "Does the get-up of the cigarettes denote the plaintiffs' goods ?" But even if the appellant Company were to be allowed so to remodel the issue, its case would not be further advanced. The appellant Company has still, as it was admitted, to show that the respondents are selling goods, not the production (or introduction) of the appellant Company, in such a way as to lead customers to believe that they are the goods which the appellant Company has introduced or marketed.

And the answer is twofold (1) It is an immaterial accident that these particular wares had from 1910 onwards been brought into India by the appellant Company and the appellant

P. C.

The Imperial Tobacco Co. of India, Ltd. *v.* Bonnan and Bonnan & Company.

Lord Phillimore.

Company only, if the appellant Company got no reputation in consequence ; (2) The respondents are doing nothing to mislead customers and are breaking no covenants.

In truth, as was observed during the course of the argument, all the business about acquiring title from the British American Tobacco Company, Limited, or the British American Tobacco Company (India), Limited, which latter was never perfectly acquired [see *Performing Right Society, Limited* v. *London Theatre of Varieties, Limited* (1)] is beside the question. No trade-mark or trade reputation of either of these Companies is infringed. The right on which the appellant Company is seeking to rely is something which it claims to have earned for itself since 1910 ; and this right, as the learned Judges have found, it has failed to establish.

There is nothing to prevent a tradesman acquiring goods from a manufacturer and selling them in competition with him, even in a country into which hitherto the manufacturer or his agent has been the sole importer. It is not likely to be a successful business operation, unless in some exceptional case. This is just such an exceptional case. The British American Tobacco Company, Limited, might, when they sold this large consignment to the British Army Canteen authorities, have required an undertaking that they should not be re-sold in India or to any one who could lawfully re-sell in India. This it appears not to have done ; and then there arose the question of the disposal after the war of this large surplus stock.

The respondents, being unhampered by covenant, are selling goods manufactured by the British American Company as being what they are, namely Wills' Gold Flake cigarettes manufactured by that Company. There is no untruth and no attempt to deceive. The appellant Company says that all genuine Wills' Gold Flake cigarettes sold in India must be their goods. It may be answered that this has been so in times past as a mere matter of fact, and because the appellant Company was protected by a covenant with the manufacturers ; but not because it had a title to a monopoly which it could enforce against strangers to the covenant.

The claim of the appellant Company is that it can stop a trader, to whom goods have been lawfully sold under a particu-

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1. (1924) A C 1.

lar description and by whom they have been lawfully bought under that description, from re-selling them under the same description. Such a claim sounds extravagant. It might, however, possibly be maintained, if it could be shown that the time, place or circumstances of the resale imported some representation that the goods were other than what they were. But in this case there is no such time, place or circumstance.

P. C.

The Imperial Tobacco Co., of India, Ltd. v. Bonnan and Bonnan & Company.

Lord Phillimore.

It is not as if the respondents were attempting to pass off as Wills' Gold Flake cigarettes stuff not manufactured by the lawful successors in title of W. D. & H. O. Wills. Any such attempt would be at once restrained at the suit of the lawful successors ; and in India and for India the appellant Company would be the lawful successors.

There is nothing in the judgments in the Courts below or in the opinion which their Lordships are now expressing to give countenance to the idea that the ordinary principles of jurisprudence with regard to trade-marks and those forbidding the passing off of goods do not apply in India. But the cigarettes now in dispute are the genuine articles, lawfully acquired from the lawful manufacturers ; and as such the respondents may sell them.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants : *F. F. Macnaghten.*

Solicitors for respondents : *Sandersons and Orr Dignams.*

A de M. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—VISCOUNT HALDANE, LORD BUCKMASTER AND LORD PARMOOR.

(On appeal from the High Court of Judicature at Madras.)

Phiroshah Bomanji Petit *Appellant**

v.

Bai Goolbai *Respondent*

Apportionment—Indian Law as to—English Apportionment Act of 1870 *and earlier Acts—Older English Law as to apportionment—Applicability in India—Rents and periodical payments, such as rents and profits from land—Dividends and income arising from shares carrying income periodically payable —Debts and securities bearing interest—Applicability to, of principle of apportionment—Presumption—Circumstances rebutting.*

P. C.

Phiroshah Bomanji Petit v. Bai Goolbai.

P. C.

Phiroshah Bomanji Petit v. Bai Goolbai.

By an *inter vivos* settlement, a Parsee conveyed property to trustees on trust, *inter alia,* to receive the rents and profits and after making certain other payments, to make over the balance of income to the settlor himself during his life. After his death the trustees were to realize, by sale, conversion or otherwise, of the trust premises, certain sums, and within 13 months after the settlor's death, out of the balance of income, from what remained accruing within the first 13 months, to pay to his widow, G., from time to time, and in such sums as she should reasonably require and the state of the income should permit, the total sum of Rs. 80,000 for purposes mentioned. The trustees were then to divide the remainder of the balance of such income arising or accruing during the first 13 months after the settlor's death among the widow and son of the settlor, and other persons, in equal shares; the capital and income, after the 13 months, were, subject to the trusts stated, to go to other beneficiaries under the trust deed as therein provided.

The settled property consisted of land and immoveables specified in the first schedule to the trust deed; shares, bonds and securities specified in the second schedule; and outstanding debts due to the settlor specified in the third schedule.

Held, that under the original English Law as it stood apart from Statute, which original law was the law applicable in India to the case before their Lordships, the income from the property specified in the first two schedules was *prima facie* only apportionable if an intention to make it so was clearly discoverable in the trust deed, while the income arising from the debts specified in the third schedule was apportionable, and that there was not in the trust deed language which, by implication, imported that apportionment was directed by the settlor to take place as regards the income from the properties specified in the first two schedules.

Neither the English Apportionment Act of 1870, nor any of the earlier English Apportionment Acts apply in India. The original English Law as it stood apart from Statute is the law which applies in India.

Older English Law as to apportionment considered.

Appeal (No. 32 of 1922) from a judgment and decree of the High Court (March 31, 1919) affirming, subject to modifications not material to the appeal, a decree of that Court in its original civil jurisdiction.

Upjohn, K. C., Tomlin, K. C. and *Raikes* for appellant.

Clauson, K. C. and *Gibson for* respondents 10 and 11.

July 28, 1923. The Judgment of their Lordships was delivered by

Viscount Haldane.

VISCOUNT HALDANE:—This is an appeal from the High Court at Bombay, which had affirmed a decree of the same Court in its original jurisdiction. The questions decided had been raised by originating summons, taken out by certain of the present respondents, who were trustees of an *inter vivos* settlement, dated August 1, 1913, and made by a wealthy

P. C.

Phirozshah Bomanji Petit *v.* Bai Goolbai

Viscount Haldane.

Parsee inhabitant of Bombay, one Bomanjee Dinshaw Petit, who died on December 17, 1915.

By this settlement the settlor had conveyed a large amount of property to the trustees on trust, *inter alia,* and so far as is material for the purposes of the questions in this appeal, to receive the rents and profits and, after making certain other payments, to make over the balance of income to the settlor himself during his life. After his death the Trustees were to realise, by sale, conversion or otherwise, of the trust premises, certain sums, and within 13 months after the settlor's death, out of the balance of income, from what remained accruing within the first thirteen months, to pay to his widow, the first respondent, from time to time, and in such sums as she should reasonably require and the state of the income should permit, the total sum of Rs. 80,000 for purposes mentioned. The trustees were then to divide the remainder of the balance of such income arising or accruing during the first thirteen months after the settlor's death among the respondent, Bai Goolbai, the widow, the respondents, Jehangir and Dhunjibhoy, and the appellant, Phirozshah, the settlor's son, in equal shares; the capital and income, after the thirteen months, were, subject to the trusts stated, to go to other beneficiaries under the trust deed as therein provided.

The settled property consisted of land and immovables specified in the first schedule to the trust deed ; shares, bonds and securities specified in the second schedule ; and outstanding debts due to the settlor specified in the third schedule.

Questions arose as to the interpretation of the deed, and an originating summons was taken out by the trustees to which the beneficiaries under the trust deed and the executors of a subsequent will made by the settlor were defendants. This summons raised a number of questions, of which two only are now raised on the appeal to His Majesty in Council. The first of these two questions arose between the settlor's executors and beneficiaries under the trust deed. It was whether an apportionment of the income of the settled properties, or any of them, should be made, as if the title to such income had accrued continuously, upto December 17, 1915, the date of the testator's death. It was contended for the executors that the whole income should be treated as accruing *de die in diem,* continuously so that although instalments, such as rents

P.C.

Phirozshah Bomanji Petit v. Bai Goolbai

Viscount Haldane.

or interest, were not actually payable until after that date, the executors of the settlor who was to take during his life-time should be held entitled to so much of what was not actually payable until after his death as was to be attributed on this footing to his title down to the date of his death.

The second question was an analogous one. It was whether, as between those who took beneficially the income for thirteen months after the settlor's death, and those beneficially entitled to the income subsequently, a similar apportionment should be made as on January 17, 1917, being the date of termination of the thirteen months' period.

The summons was heard by Kajiji, J., who decided against the application of any principle of apportionment, excepting as to interest on the debts due to the settlor specified in the third schedule and such of the securities specified in the second schedule as bore interest. As to these, it was not disputed by the respondents that his view was right. He gave no reasons for his judgment.

The case was heard on appeal by Scott, C. J. and Hayward, J. and these learned Judges affirmed the decision of Kajiji, J. The only question which now arises is whether there is applicable, under Indian Law, any principle of apportionment which applies to rents and periodical payments, such as rents and profits from land, and the dividends and income arising from shares carrying income periodically payable, such as are specified in the second schedule.

The point is raised on this appeal by one of the beneficiaries whose interest it might have been to contend that the principle of apportionment did not apply to the property in the first two schedules. He has, however, severed from his co-beneficiaries, and contends that the principle does apply, having regard to the terms in which the settlement is expressed, and this is the question which their Lordships have to decide.

The English Apportionment Act of 1870 provides that after its passing, all rents, annuities, and other periodical payments in the nature of income are, unless it is expressly stipulated that no apportionment is to take place, to be considered as, like interest on money lent, accruing from day to day, and shall be apportionable in respect of time accordingly. But this Act does not apply in India, nor do any of the earlier English Apportionment Acts. It is common ground that the principle

P. C.
Phirozshah Bomanji Petit v. Bai Goolbai
Viscount Haldane.

which applies in the present case is that of the original English Law as it stood apart from statute. The older English Law on the subject was stated by Lord Eldon in *Ex parte Smyth* (1) and is amplified in the learned note appended to the report of that case by Mr. Swanston. The latter traces it to the two propositions, that an entire contract cannot be apportioned, and that under such an instrument as, for instance, a lease with a reservation of periodically payable rent, the contract for each portion is distinct and entire. The rule, however, while applicable to periodical payments becoming due at fixed intervals, did not apply to sums accruing *de die in diem.* It did not, for example, apply to annuities or to debts. The distinctions drawn were often fine. But it is not necessary for their Lordships to discuss them, because it is plain that, however clear the principle which governed the character of propriety and contractual rights, it was always open to a testator or settlor, with full power of disposition, to exclude its practical consequences. He had only to say that it was his intention that the person entitled to the fixed sum, payable only after the determination of the intermediate title, should account to those in whom that intermediate title was vested or their representatives. Such an expression of intention had, at least, the effect of creating a trust in equity, and might, in certain cases, be operative at law by giving a special character to the title to the periodical payments. It had the effect of making the question, in most instances, one merely of construction of the instrument.

It is common ground that the old law in England, as referred to in 1818 by Lord Eldon in *Ex parte Smyth* (1) was the law applicable in India to the present case, and that under it the income from the property specified in the first two schedules was *prima facie* only apportionable if an intention to make it so was clearly discoverable in the trust deed, while the income arising from the debts specified in the third schedule was apportionable. The only question which now arises is as to the former, and as to this there is no question of difficulty as to the general principle of law. The real controversy is as to whether there is not in the trust deed language which, by implication, imports that apportionment was directed by the settlor to take place.

In order to answer this question their Lordships, therefore, turn to the provisions of the instrument.

1. (1818) 1 Swans. 337.

P. C.

Phirozshah Bomanji Petit v. Bai Goolbai

Viscount Haldane.

Under the first trust in the settlement the trustees are to get in the income of the whole of the property settled, from whatever the sources specified in the schedules "arising," and to pay the balance to the settlor for and during the remainder of his life, "and down to his death." The subsequent direction is contained in the trust in the deed numbered 4 (*b*). This is to pay to the widow within thirteen months of the settlor's death out of the balance of the "income accruing within the first thirteen months" the Rs. 80,000 already referred to. The trustees are further directed to divide the remaining balance of the income "arising or accruing" during the first thirteen months after the settlor's death among four beneficiaries named in equal shares. The direction in the deed operates under the form of a trust for sale. The balance of the proceeds of sale and the income to be derived from it, are to be held as subsequently directed, "except the income arising or accruing due for and within the first thirteen months after the settlor's death," as to which there is reference back to the direction already quoted.

It was argued for the appellant that the juxtaposition of the expressions "arising" and "accruing," and the employment of them in the language of the deed as if interchangeable, indicated that the income was intended to be treated as one the title to which was contemplated as accruing continuously. Moreover, it was said, if the trustees were to alter the character of the investments, they might from time to time vary the rights of those beneficially entitled at their pleasure, and that this the settlor could not have contemplated. But their Lordships do not think that reliance can properly be placed on these arguments. The character of payments such as those directed is *prima facie* discontinuous at common law. No doubt, the settlor could have given directions which would have modified this character, or at least, have deprived it of the consequences arising from its discontinuity. But such directions would have had to be clear and unambiguous in order to have had the result of varying the rights defined by the general law. Their Lordships can find no such distinctness in direction in the deed before them as would have been required to have this effect.

They will accordingly humbly advise His Majesty that the appeal should be dismissed. The trust estate is very large and the trustees found it necessary to have the questions which

have arisen decided by the Courts below. There the costs were allowed out of the estate. As regards the present appeal, their Lordships think that justice will be done if the appellant has no costs and the tenth and eleventh respondents who contested the appeal have their costs, as between party and party out of the estate. The trustees do not appear separately on the appeal. They will be entitled to have reimbursed to them any expenses to which they have been put by it.

P. C.
Phirozshah Bomanji Petit *v.* Bai Goolbai
Viscount Haldane.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents Nos. 10 & 11 : *Lattey & Hart.*

Solicitors for respondents Nos. 5 to 9 : *Sanderson & Orr Dignams.*

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Ammakannu Ayi — *Appellant** (*Plaintiff.*)

v.

A male child (not named), minor son of Palani Ayya *alias* Ramaswamy Odayar, deceased, 1st Defendant, by guardian Murugayya Odayar — *Respondent* (*2nd Deft.*)

Ammakannu Ayi *v.* Murugayya Odayar.

Mortgage—Construction —Personal liability —Fiduciary capacity— When can be presumed—Election of remedies—Estoppel.

Where there is nothing in a mortgage deed to show that the mortgagor is acting in a fiduciary capacity, viz., guardian of an adopted son, and the evidence in the case showed the mortgagor throughout ignored the adoption and the mortgagee was a near relation who must have known all the facts, there is no warrant for drawing the presumption that the mortgagor acted otherwise than in his personal capacity. In each case the language of the document and the circumstances in which it was executed have to be considered.

Where a plaintiff has the choice of suing two persons on the same cause of action, it may happen that if he elected to sue only one of them and obtained a decree against him, he would be estopped from suing the other. But if he obtained a decree on a mortgage under the belief that his mortgagor acted in a personal capacity but afterwards finds he was acting in a fiduciary capacity, he is not debarred from suing the right person.

Per Ramesam, J. :—A wrong suit followed by a wrong decree never bars a correct suit.

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*Appeal No. 160 of 1921. 6th February, 1924.

Ammakannu Ayi v. Murugayya Odayar.

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in Original Suit No. 46 of 1917, dated the 18th of December, 1920.

C. Krishnaswami Rao and *K. S. Jayarama Iyer* for appellant.

A. Krishnaswami Iyer and *V. Sundaram Iyer* for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENT :—*Ramesam, J.* :—The facts have been stated by my learned brother whose judgment I have had the advantage of reading and need not be repeated.

A preliminary question of law raised by the defendant to the Court below and repeated here has first to be dealt with. He contends that, as the plaintiff filed her suit against Rathnathayi in 1914 and obtained a decree, she has elected her remedy and the present suit is not maintainable. He relies on *Scarf* v. *Jardine* (1) ; *Morel* v. *Earl of Westmoreland* (2) and *Moore* v. *Flanagan* (3). He also relies on *Kendall* v. *Hamilton* (4). *Scarf* v. *Jardine* (1) is a case of a customer of an old firm of partners selling goods to a new firm consisting of an old partner and a new partner and carrying on business under the old style without notice of the change. In that case, the old firm was liable only on the ground of estoppel and after the plaintiff sued the new firm, it was held that he disavowed the estoppel and could not set it up again (*see* Lord Selbourne, L. C., at 350). It was a case where either firm (but not both) could have been held to be legally liable. The present case is not a case where either Rathnathayi or the present 1st defendant can be legally held to be liable on the mortgage. If Rathnathayi is the owner of the mortgaged properties, only Rathnathayi is liable on the mortgage and not the 1st defendant. If, however, the 1st defendant is the owner of the suit properties, and if it is held that Rathnathayi did not represent him in executing the mortgage bond, she is personally liable and on the mortgage neither is liable. If it is held that Rathnathayi represented him in executing Exhibit A, the 1st defendant is liable on the mortgage and Rathnathayi is not liable. Thus, on no version of the facts, do we get a case where plaintiff, at his option, can hold one or other

1. 7 A. C. 345. 2. (1903) 1 K. B. 64 on p 76 (per Collins M R) on appeal (1904) A C 11. 3. (1920) 1 K B 919 at p. 921. 4. 4 A C 504.

Ammakannu Ayi *v.* Murugayya Odayar.

Ramesam, J.

of two persons (but not both) liable. The alternation of the liabilities of Rathnathayi and 1st defendant arises on different views of the facts. I am, therefore, of opinion that the case in *Scarf* v. *Jardine* (1) does not apply. The cases of *Morel* v. *Earl of Westmoreland* (2) and *Moore* v. *Flanagan* (3) are similar. It was held in each of those cases that it was not a case of joint liability but only of alternative liabilities and *Scarf* v. *Jardine* (1) applied.

The other case relied on by the appellant *Kendall* v. *Hamilton* (4) was a case of agent and principal. Under S. 233 of the Contract Act the liability of the principal and agent is joint and several. The question how far the principle of *Kendall* v. *Hamilton* (4) will apply in India has been the subject of difference between the Indian High Courts and cannot be regarded as quite settled (see *Shivlal Motilal* v. *Birdichand Jivraj*) (5) and *Kendall* v. *Hamilton* (4) and *Muhammad Askari* v. *Radha Ram Singh* (6) unless the decision in *Bhagwati Prasad* v. *Radha Kishen Sewak Pande* (7) can be regarded as settling it. That was a case of an agent and undisclosed principal and the Privy Council reversing the decision in *Bir Bhaddar Sewak* v. *Sarju Prasad* (8), in which the High Court dismissed the suit against the principal following *Priestby* v. *Fernie* (9) and referring to the notes to *Thompson* v. *Davenport* (10) gave an equitable charge against the principal. The fact that *Bir Bhaddar Sewak* v. *Sarju Prasad* (8) was reversed by the Privy Council in *Bhagwati Prasad* v. *Radha Kishen Sewak Pande* (7) was evidently not noticed by that High Court in *Muhammad Askari* v. *Radha Ram Singh* (6).

The point need not be pursued in this case as it does not arise.

It has been never held that a wrong suit followed by a wrong decree bars a correct suit and we therefore hold the suit is maintainable.

It now remains to find, on the facts, whether Rathnathayi, in executing Exhibit A, intended to act on behalf of the minor or not. The cases cited by the appellant (viz., *Hanuman*

1. 7 A C 345. 2. (1903) 1 K B 64 on p 76 (per Collins M R); on appeal (1904) A C 11. 3. (1920) 1 K B 919 at p. 921.
4. 4 A C 504. 5. 19 Bom L R 370 following 3 H and C 977.
6. (1900) I L R 22 All 307 : 20 A W N 73 7. (1893) I L R 15 All 304 (P C).
8. (1887) I L R 9 All 681 : 7 A W N 229. 9. 3 H & C 977. 10. 9 B & C 78.

Ammakannu Ayi v. Murugayya Odayar.

Ramesam, J.

Persad Pandey v. *Mussumat Baboojee Munraj Koonwaree* (11), *Jadunath Chakerbutty* v. *Mr. James Tweedie* (12), *Makundi* v. *Sarabsukh* (13), *Watson and Co.* v. *Sham Lal Mitter* (14), *Murari* v. *Tayana* (15), *Venkataramanachari* v. *Thirunarayanachari* (16), *Velayudham Pillai* v. *Perumal Naicker* (17) can help her only if, on the facts of this case, we can find that Rathnathayi did not act in her own right and intended to act on behalf of the minor. *Ammani Ammal* v. *Ramaswami Naidu* (18) and *Balwant Singh* v. *R. Clancy* (19).

I may observe that the personal covenant in Exhibit A, by itself, has, in my opinion, no bearing on the matter as that is the form of the document whatever the intention of the document might have been. If the plaintiff was an entire stranger to the family, I would not attach any importance to the allegations in paragraph 11 of the plaint where she denies the adoption. But, seeing that plaintiff, though an assignee from the original mortgagee, is not a stranger to the family, her attitude in the said paragraph throws a good deal of light on that of Rathnathayi and Doraiswami Odayar at the time of the execution of Ex. A. Now, not only is the plaintiff the mother of Rathnathayi, but her husband (who was also her maternal uncle) was a cousin of Doraiswami Odayar, and she was also a sister of Doraiswami's wife. She must have known the transactions of her daughter from the time of the latter's husband's death. On an examination of the prior transactions mentioned in Ex. A it strikes one that, while the first three represented by Exs. B, C, D, are genuine (this is conceded and admitted by defendant whose witnesses D. W. 1, 2, 3 prove them), the rest are all spurious items intended to swell up the consideration of the document to Rs. 3,000 (*see* D. W. 7) for some motive of their own (*see* D. W. 6). What these motives are, it is difficult to determine now. The consideration and motive of Ex. A are shrouded in mystery. Seeing that the deed of adoption Ex. I makes the 1st defendant continue to be the son of Doraiswami (*see* also Ex. CC, the deed of partition in Doraiswami Odayar's family and Ex. EE) it is possible that Rathnathayi entered into Ex. I on the under-

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11. 6 M I A 393 at p. 411.
12. 11 W R 20.
13. (1884) I L R 6 All 417 : 4 A W N 144.
14. (1887) I L R 15 C 8.
15. (1895) I L R 20 Bom 286.
16. (1914) 2 L W 212.
17. (1915) 2 L W 1210.
18. (1918) 37 M L J 113.
19. (1912) 34 All 296.

Ammakannu Ayi v. Murugayya Odayar, Ramesam, J.

standing that the adoption of the 1st defendant was to be regarded as sham or bogus. It may be that she was allowed to deal with properties for some time in our own right. But Ex. II and the events that have since happened make it too late so far as she is concerned, to question the adoption though it may still be open to the reversioners of her husband, if any, to question it within 12 years after Rathnathayi's death. In 1908, Rathnathayi dealt with the properties thinking they were her own (Ex. W.) In 1909, misunderstandings seem to have arisen between Doraiswami Odayar and Rathnathayi (*see* D. W. 6) and possession of the properties of Thambuswami was obtained by the minor in 1910 (Ex. X &c.) In 1914, the plaintiff filed her suit on Ex. A (O. S. No. 37 of 1914) (Ex. XV). It is obvious this suit was a friendly suit so far as she and Rathnathayi were concerned but their attitude was adverse to the minor and Doraiswami contested the suit. That plaintiff and Rathnathayi continue to be on friendly terms is clear from the fact that the latter has been examined as P. W. 3 in this case. Rathnathayi admits that she, her brother P. W. 1 and plaintiff are living together. In her examination, she was not asked a single question to show that she executed the document on behalf of the 1st defendant nor was Doraiswami (D. W. 6) cross-examined on the matter. It is clear that the adverse attitude of Rathnathayi continues to this day and this explains why plaintiff made the allegations in para. 11 of the plaint. I therefore agree with my learned brother that Rathnathayi never intended to execute Exhibit A on the minor's behalf nor can any decree be given against the minor on any other ground in the circumstances of the case.

The appeal fails and is dismissed with costs.

Jackson, J.

Jackson, J.—Suit for a declaration that defendant is bound to pay plaintiff Rs. 7,237-9-9 both under the decree obtained by plaintiff in O. S. No. 37 of 1914 on the file of the Court of the Subordinate Judge of Mayavaram against one Rathnathayi and also as being due under a hypothecation bond executed on plaintiff's behalf. The lower Court dismissed the suit and plaintiff appeals.

The facts are as follows :—Thambusami Odayar (*vide* genealogy Ex. M) died on 2nd August 1905 leaving a widow

Ammakannu Ayi v. Murugayya Odayar.

Jackson, J.

Rathnathayi. On 23rd August 1905 (Ex. I) she adopted Palani Odayar, a son of her husband's uncle Doraisami Odayar. On 5th August 1906 she hypothecated property belonging to her late husband to this same Doraisami (Ex. A.). On 3rd January 1907 he transferred this deed of hypothecation to his wife's sister Ammakannu Ayi, who is also the mother of the mortgagor, Rathnathayi. In 1914 Ammakannu Ayi sued Rathnathayi and Doraisami on this deed. In the plaint Ex. XV she recites that Thambusami died leaving no heir whatsoever. For discharging his debts and necessary expenses Rathnathayi hypothecated certain property of his. If she should fail to recover the amount claimed from Rathnathayi, Doraisami should be made responsible. She obtained preliminary and final decrees against Rathnathayi alone, Exs. G, G1, on the 15th September 1914 and 15th November, 1916. The plaint in the present suit is dated 13th August 1917. It sets forth how Rathnathayi hypothecated her husband's property and how plaintiff obtained a decree. Execution was pending and plaintiff, when about to bring the property to sale, learnt that for some time past it had been in the possession of Palani, the present defendant, who was adopted as son of Thambusami by registered deed in August 1905. This deed was executed without Thambusami's permission, and the adoption was not really made (paragraph 11 of plaint). Palani, however, is bound to satisfy the decree obtained against Rathnathayi, since she *bona fide* executed the hypothecation in order to pay off her husband's debts, and Palani has enjoyed the benefit of her action.

On these pleadings the Subordinate Judge framed among other issues, Issue U, whether the suit mortgage bond is supported by consideration, and is true, valid and binding on the defendants. He found (paragraph 16) that the suit document was genuine and supported by consideration, and was not binding on the defendants. Accordingly he dismissed the suit.

Plaintiff urges that, although the suit hypothecation deed contains no recital that Rathnathayi was acting as guardian of her adopted son, she must nevertheless be presumed to have so acted. The question for determination is whether there is any ground for making such a presumption. Rathnathayi has consistently ignored the adoption. It is evidenced by the registered deed Ex. I, dated 23rd August, 1905, and Palani was admittedly in enjoyment of Thambusami's estate. Yet on 26th

November 1905, Ex. F, Rathnathayi executed a pro-note for discharging a debt of her husband's with no mention that she was acting as guardian of her adopted son. In the present suit document Ex. A, dated 5th August 1906, there is not the smallest indication of the existence of an adopted son and Rathnathayi acts entirely in her own right. It cannot even be said that the husband's debts exhaust the consideration, for Rs. 301-1-0 is received for Rathnathayi's domestic expenses and Rs. 283-6-9 for her prospective journey to Benares. Moreover she makes a personal covenant to pay interest.

In June 1908 Rathnathayi leased out property as belonging to herself alone. (Ex. W). In June 1914 when she was sued on Ex. A. her obvious defence would have been that she acted merely as guardian of her adopted son, but so far from raising this plea, she remained *ex parte* and admitted the mortgage sued upon. (*Vide* Ex. G2). She has been examined as plaintiff's witness 3 in the present suit, and if plaintiff wished to establish that she acted on behalf of her adopted son something might have been elicited about this adoption. No such question was put and at this stage of the case plaintiff seems to have been relying solely on the alternative plea that irrespective of the adoption the bond is binding on the defendant inasmuch as it was executed *bona fide* and for proper consideration (paragraph 13 of plaint). If some stranger to the family had *bona fide* advanced money to discharge the father's debts under a misapprehension of Rathnathayi's title and in ignorance of the adoption a Court might be justified perhaps in not demanding very rigid proof that the bond was actually executed on the adopted son's behalf. But in this case the parties were alive to all the facts. The original mortgagee is the adopted son's natural father and his transferee, the present plaintiff, is mother of the mortgagor and sister of the mortgagee's wife. Nobody could have been deceived as to the facts. Besides, however much a Court may feel constrained to help a *bona fide* mortgagee for consideration, there must be some ground upon which to base the presumption that a document executed in the sole name of the mortgagor is really executed in a fiduciary capacity. In *Watson and Co.* v. *Sham Lal Mitter* (14) it was urged that a widow had not professed

14. (1887) I L R 15 Cal. 8.

Ammakannu Ayi v. Murugayya Odayar.
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Jackson, J.

to act as guardian of her son, but it was found that after her name in the document there were these words "mother of Sham Lal Mitter minor" which were held to justify the view that she was acting as the guardian of her son. *Murari* v. *Tayana* (15) affords stronger support to the plaintiff because the document in question contained no mention of the minor and was an outright sale by the widow in order to discharge her husband's debts. But there it was found that the widow had the intention to sell *qua*-guardian, and a case was cited where it was held that a manager may sell without necessity and be accounted manager even though he has not described himself as such. *Jadunath Chakerbutty* v. *Mr. James Tweedie* (12). In the present case such intention can hardly be presumed because as set forth above Rathnathayi has consistently exhibited the contrary intention to deal with the property in her own right and to ignore the adoption, which intention both plaintiff and Doraiswami assumed as a fact in O. S. No. 37 of 1914 when the hypothecation deed was first brought to Court. And even if it were established that the husband's debts were discharged from pressing necessity, there still remains that part of the consideration which was entirely personal to Rathnathayi herself. "In each case the language of the deed and the circumstances in which it was executed have to be considered." *Murari* v. *Tayana* (15). Here neither the language nor the circumstances warrant any presumption that Rathnathayi acted as guardian. Therefore the latter part of issue 5 has been correctly decided by the lower Court, and there is no necessity to go into the question in Issue IV whether if plaintiff had established that Rathnathayi executed Ex. A as guardian of Palani he would be estopped from suing Palani by the judgment obtained in O. S. No. 37 of 1914 against Rathnathayi in her individual capacity.

When a plaintiff has the choice of suing two persons on the same cause of action it may happen that if he elect to sue one and obtain a decree he is estopped from suing the other. If the present plaintiff had sued Rathnathayi as agent of Palani and had obtained a judgment it might be argued that he was estopped from suing Palani. But when in the belief that Rathnathayi had executed the hypothecation in her own right

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15. (1895) I L R 20 Bom. 286. 12. 11 W R 20.

Ammakannu Ayi v. Murugayya Odayar.

Jackson, J.

plaintiff has obtained a judgment against her, and has then learnt that Rathnathayi could only have executed it as guardian of Palani there is no question of estoppel. It is simply as if she first sued the wrong person and subsequently sued the right person.

The bare facts that there was full consideration and *bona fides* cannot make the defendant liable.

The appeal accordingly fails and is dismissed with costs.

I agree with my learned brother as regards the memorandum of objections.

T. S. V. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT:—LORD ATKINSON, LORD SHAW, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

(On Appeal from the High Court of Judicature at Madras)

Sri Raja Vatsavaya Venkata Subhadrayamma Jagapati Bahadur Garu ... *Appellant**

v.

Sri Poosapati Venkatapati Raju Garu and five others ... *Respondents.*

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

Trust deed—Construction—Property title to which is subject-matter of suit—Trust deed in respect of—Management of property, conduct of suit, etc., with regard to same—Power of, vested in trustee for preservation of property—Borrowing for purposes of suit—Power of, of trustee and of settlor—Creditor's right to lien on property gained by litigation.

R, who was about to institute a suit to establish his title to the absolute interest in the Vizianagram estate subject to the life-interest in *C* created by the will of the deceased Maharajah, executed a deed of trust by which he appointed *V* (the original trustee) trustee of all the property in which he, *R* claimed to have a vested interest in remainder as heir of the deceased Maharajah in trust to administer the fifteen-sixteenths of the same for his, the settlors' own benefit, and one-sixteenth of the same for the benefit of respondents 5 and 6. Powers were, by the trust deed, conferred upon the trustee and upon the settlor respectively, which were both wide and important. The words conferring them ran thus:—

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*P C Appeal No. 145 of 1920. 5th May, 1924.

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma *v.* Sri Poosapati Venkatapati Raju.

"Therefore you (*i. e.,* the trustee) should not only manage the trust property subject to the arrangements I may make regarding the consideration for your trouble, etc., and other matters but also full authority is given you to conduct suits, etc., either jointly with me or separately, and to manage it in such a way as you may think fit for the preservation of the properties."

On a construction of the deed, *held* that the trustee would have been acting within his express powers if having money of his own at his command, he thought proper to advance it, or some of it, to finance the contemplated litigation directed to secure and preserve the trust property for the purpose of the trust, by establishing that the settlor was the lawful heir of the deceased Maharajah, and in the event of that suit being successful would have been entitled to a lien on the property gained for the sum advanced.

Held further that if the trustee, not having money of his own available, borrowed money from a third party for the purposes above-mentioned and actually used it to promote those purposes, then, in case the litigation were successful, the person who advanced the money would be entitled to stand towards the trust property in the place of the trustee and be entitled to a similar lien on that property, while if the settlor, with the assent and concurrence of the trustee, borrowed money absolutely necessary to finance the suit, from a third party for the purposes above-mentioned and so applied it, then, in the event of the litigation being successful, the person who advanced the money would be equally entitled standing in the shoes of the settlor to a lien on the property preserved for the trust by his outlay.

Champerty—Agreement to finance litigation—Property existent but title to which is subject-matter of pending suit—Agreement as regards—Validity—Disbursements by borrower of amounts advanced—Vouchers of—Condition to furnish—Breach of—Rights of parties on—Compromise of litigation contemplated—Consent of lender and of borrower's Vakil to—If a condition precedent—Property obtained by compromise—Creditor's rights over—Action at law—Assignment of fruits of—Validity—Fruits of action got by compromise—Fruits got by decree or verdict —Distinction —Non-existent property —Agreement to assign —Property coming into existence subsequently—Assignees' rights in case of.

R and others, who had instituted O. S. No. 18 of 1903, to establish *R's* title to the absolute interest in Vizianagram estate subject to the life-interest of *C,* being in want of funds to carry on the said litigation, approached the Rajah of Tuni for financial aid, and entered into an agreement with him, which provided, *inter alia,* as follows :—

"Cl. 1...........It is therefore agreed that you (the Rajah of Tuni) should advance for the proceedings of the said suit and appeal money up to a sum not exceediing two lakhs of rupees and within that limit as per the conditions mentioned below ; that in respect of the money advanced by you from time to time, detailed receipts for the Vakil's day fees, etc., printing, stamps and house rents, should be furnished to you ; that as regards the whole of the balance, accounts of receipts and expenses should be rendered to you and for the sum so ascertained, you should obtain receipt from *R* out of us and with respect to the money that may again be required, you should, at the request of *R* out of us, advance money, look into accounts, and get detailed vouchers for moneys spent as above-stated and settle accounts then and there without giving room for any disputes at a further time.

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma *v.* Sri Poosapati Venkatapati Raju.

"Cl. 10. We shall not compromise with the defendant, or file razinama or withdrawal without your consent.

"Cl. 11. It is agreed that, if Mr. *K*, High Court Vakil, who is working on our behalf in this suit advises us from the then existing circumstances of this suit, that it would be better for us to compromise, we should agree to it and compromise or withdraw the suit.

"Cl. 12. Moreover, out of the moveable and immoveable properties that may be obtained by such compromise, etc., we shall first pay to you the principal money advanced by you together with interest at Re. 1-0-0 (one rupee) per mensem from the respective dates, and out of the moveable and immoveable properties that remain after so giving away (to you) we shall at once execute and give you a proper sale-deed and place in your possession 3|32 share. All of us and our heirs are liable to you and your family members according to all the aforesaid terms and are also bound to give effect to them without fail."

The Rajah advanced a portion of the amount which he undertook by the agreement to advance, and, before making any further advances, insisted upon vouchers being furnished to him as regards fees alleged to have been paid to pleaders and as regards amounts spent on lodging expenses, house rents, etc. *R*, the settlor, sent a reply (dated 14—2—08) to the Rajah's demand for vouchers which reply ran as follows :—

"While not even a half of the amount agreed to be expended for the suit has yet been spent and while you are liable yet to pay the entire amount for the expenses of the suit and though the arrangement is that you should not fail to spend the amount required for expenses in this Court (Court of first instance), and though you are fully aware of the fact that, in the event of your failing to do so, the agreement would be cancelled, you have, without sending money when required by us, written this letter concocting false and unnecessary reasons. I do not know what reply you expected to be given thereto. For the money spent previously, the necessary explanations, accounts of credit and debit and receipts bearing my signature have been sent.....when credit and debit accounts have been sent under my signature and on my responsibility I do not see proper reasons for the transaction being stopped."

Held, on a construction of the agreement (set out above), (1) that the Rajah was entitled to insist upon vouchers of the disbursements made by *R* out of the sums advanced by the Rajah under the agreement, the settlor, *R*, was bound to send vouchers of those disbursements whether demanded by the Rajah or not, *R's* letter dated 14—2—08 amounted to a refusal by him to send them, coupled with an intimation that if money was not sent, though the vouchers should not be furnished in the first instance, he, *R*, would treat the contract evidenced by the agreement as at an end, the settlor, *R*, in sending the letter broke the contract and the Rajah might, if he wished, have taken the refusal of *R* to furnish vouchers as a repudiation by him of the contract and have elected to treat the contract as at an end, but if the Rajah did not do so, it was not open to *R* to put an end to the contract merely by committing a breach of it ; (2) that the agreement embodied in cl. 12 of the agreement was an agreement by the plaintiffs in O. S. No. 18 of 1903 to assign to others part of the fruits they might acquire in an action at law and therefore perfectly legal ; and there could be no distinction on the point between the fruits of an action

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

which the plaintiffs got by compromise and the fruits he would receive by a decree or verdict in his favour ; (3) that even if the money given to the plaintiffs in the compromise was a non-existing thing at the date of the agreement and only came into existence subsequently at the date of the compromise decrees contemplated by the agreement, the agreement attached to the things so coming into existence subsequently ; and (4) that on the true construction of Cls. 10, 11 and 12 of the agreement the giving of the consent of the Rajah and of the Vakil, *K*, was not a condition precedent which must be performed before any compromise could be validly made.

"Moveable or immoveable property" in cl. 12 of the agreement includes almost every conceivable kind of property, and the words of that clause would be satisfied if half the estate sued for, or another estate or the jewels of the tenant for life *C* deposited in his safe, and the money packed in his money bags had been awarded under the compromise.

As regards the clause relating to the consent of the Rajah or the Vakil to the compromise, it would be unbusinesslike and indeed irrational, if not absurd, for the parties in 1907 (the date of the agreement) to have entered into a contract making such consent a condition precedent to the compromise which might be entered into years after. A term must, therefore, be implied to exist in the contract to the effect that the consent mentioned should be given when possible.

Deed—Construction—Evidence—Surrounding circumstances—Reference to—Permissibility.

In the construction of written or printed documents, it is legitimate in order to ascertain their meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply.

Champerty—Maintenance—Legality of, in India.

In India, champerty or maintenance is not illegal.

Contract—Right to put an end to—Breach of contract—Putting an end to contract by committing.

A party to a contract cannot put an end to it simply by committing a breach of it.

Appeal from a decree of the High Court of Judicature, Madras (21st March 1918) reversing a judgment of the temporary Subordinate Judge, Vizagapatam (6th December 1915) in Suit No. 10 of 1913, decreeing the plaintiff's claim.

On the 22nd May, 1887, the Maharaja of Vizianagram died, leaving a will in favour of Raja Chitti Baboo. Sri Poosapati Ramachandra Raju Garu (respondent 2), who was distantly related to him, put forward a claim to the effect that, under the joint operation of Hindu law and of the said will, he had a vested remainder in the whole of the Vizianagram estates, expectant on the death of Raja Chitti Baboo. On

the 12th July, 1903, the said Ramachandra Raju executed an irrevocable trust-deed, whereby he appointed a trustee (Sri Poosapati Venkatapati Raju Garu) to administer the said estates

"Therefore I appoint you as trustee in respect of all properties mentioned in the schedule hereto, *i. e.*, to administer the properties in respect of which I have a right to the vested remainder as aforesaid excepting Kumili village, for my benefit and only 1|16th share of the properties in respect of which I have absolute ownership and powers of alienation out of the abovementioned properties for these two persons, namely, Sri Poosapati Kumararaju Garu's son Ramabhadraraju Garu and Sri Poosapati Narasimharaju Garu's son Kumara Venkatapati Raju Garu and hereby deliver to you the same with all the rights I possess. Therefore you should not only manage the trust properties subject to the arrangements I may make regarding the consideration for your troubles, etc. and other matters but also full authority is given to you to conduct suits, etc. either jointly with me or separately and to manage in such a way as you may think fit for the preservation of the properties. I shall not cancel this trust deed."

He then instituted a suit (No. 18 of 1903) in the District Court at Vizagapatam, joining the trustee and the beneficiaries under the trust-deed as plaintiffs, for a declaration that he, as nearest heir of the late Zamindar, was entitled to the vested remainder in the said estates after the death of the then Zamindar. On the 13th December, 1906, the said trustee died, and Ramachandra Raju appointed a new trustee (respondent) in his stead. Being unable to carry on this litigation for want of funds, the second respondent and the others approached the late Rajah of Tuni, Sri Raja Vatsavaya V. S. Jagapathi Raju Bahadur Garu (husband of the appellant) for financial help, and accordingly on the 22nd May, 1906, respondents 2 to 4 (inclusive) executed the following agreement in favour of the Rajah :—

"Agreement, dated 22nd May, 1906, executed to Sri Rajah Vatsavaya Venkata Simhadri Jagapati Raju Bahadur Zamindar Garu, son of Sri Rajah Vatsavaya Suryanarayana Jagapati Raju Bahadur Zamindar Garu, Kshatriya, Zamindar, residing at Tuni, Tuni Sub-District, Tuni Division, Godavari District, by (1) Poosapati Ramachandra Raju, son of the late Sri Poosapati Sanyasi Raju Garu and his sons, (2) Do. Rama Raju and (3) Do. Buchi Appalaraju *alias* Acharya Raju, Kshatriyas, Mokhasadars, residing at Poosapatirega, Vizianagram Sub-District, Vizagapatam District. In respect of the suit O. S. No. 18 of 1903 which I, Ramachandra Raju out of us, who is the Huqdar (person entitled) to the property of the late Sri Ananda Gajapati Maharajah Garu after the death of the present Rajah of Vizianagram, have filed in the District Court of Vizagapatam, we have, in view of our want of money, arranged with certain persons to help us with money. But as the defendants have instigated all of them (not to help us) and as we are urgently

P. C.

Sri Raja Vatsavaya Venkata Subhadra-yamma *v.* Sri Poosapati Venkatapati Raju.

and absolutely in need of financial help, we have requested you to supply us (with money).

"It is agreed that, for the money so supplied by you, you should be given 3|16ths of the moveable and immoveable property in dispute in the said suit by means of a registered sale-deed to be executed in your favour soon after the suit is decided in our favour and that the sum of Rs. 1,50,000 caused to be given by you as consideration therefor should be utilised for the expenses, etc. of the said suit as particularised below.

"Though Poosapati Venkatapati Raju has no right to recover from us the amount he has expended before this for the said suit, yet in case he conducts himself justly by not colluding with the defendants and by being helpful to plaintiffs instead of working against us in the suit, he should, on our request and on his cancelling by means of a registered document, the trust deed executed in his favour by Ramachandra Raju out of us, be paid from out of the said sum of Rs. 1,50,000 as much as may be thought proper to be paid to him for the sum spent by him ; you should, on a receipt from Ramachandra Raju Garu, out of us, cause to be paid all just and necessary expenses to be incurred for the said suit hereafter ; whenever you yourself spend money for the necessary expenses of the said suit you should deduct that amount from the said sum itself. Should the above suit be disposed of favourably to the said Ramachandra Raju out of us in the lower Court before the said sum of Rs. 1,50,000 is completely spent, the remaining amount shall be kept in deposit with a person interested in both of us for being spent in the Appellate Courts and the same spent for the expenses of the appeals and the appeals conducted by you.

"2 (*a*) If, after the property agreed to be sold to you is sold and put in your possession, there happens any obstruction at any time to your enjoying the same for any reason, we and our heirs shall be bound to pay you and your heirs in cash every year permanently the annual profit that you ought to get from such property.

"(*b*) If, perchance you do not like to take a sale deed from us for the above-mentioned property and if you are willing to pay the *peishkush* due and keep enjoying the property as *permanent mustajari,* we shall execute the necessary document therefor and put you in possession of the property.

"(*c*) If, for any reason, you are not willing to take a sale-deed or a permanent *mustajari* (lease), we and our heirs shall be bound to pay you and your heirs on the security of our property the amount you advanced together with interest at 3 per cent. per mensem from the date of the advance.

"(*d*) If we do not execute to you a sale-deed in respect of the above-mentioned 3|16ths portion of our property agreed to be sold to you or if we do not give you possession of the same even after we get possession of the property or if we cause any obstruction to your enjoying the property after the same is put in your possession by us or if we argue in any Court that the sale-deed executed by us to you is not valid or if we commit any other act by which obstruction is caused to your freely enjoying the said property, we shall be bound to make good to you the loss that you may thereby sustain by paying you an amount equal to twenty times the income of the said property.

P. C.

Sri Raju Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

"3. If you do not like to spend money and conduct the above suit in all the three Courts as aforesaid, it is agreed that you should spend only Rs. 50,000 for the subsequent proceedings of the above suit in this Original Court only and that you need not spend anything more than that. As regards the refund to Poosapati Venkatapati Raju, of the amount advanced by him, you need not pay the sum if you intend to spend money and conduct the suit in this Original Court only. Though you may spend money as aforesaid and conduct the suit in the Original Court only, and afterwards cease to advance money and though we may get financial help elsewhere and conduct the appeals ourselves, we shall, as soon as we get possession of the suit property, sell to you by means of a sale-deed, only one-third of the property agreed to be sold to you for your conducting the suit in all the Courts and put you in possession of the same. If you do not like to take a sale-deed from us as aforesaid, we and our heirs shall be bound to pay you and your heirs the amount spent by you in the lower Court, with interest at 2 per cent. per mensem from the date of the judgment of the lower Court on the security of the immoveable property proposed to be sold to you.

"It is agreed that, even if the suit is compromised in the Appellate Court, we should act up to the aforesaid condition only. Should the suit be compromised while you are spending money and conducting the suit we shall pay you the sums spent by you with interest at 1 per cent. per mensem from the respective dates on which the several sums were spent out of the moveable and immoveable property remaining after deducting the principal and interest so paid, we shall be bound to give you 3|32 share. If you fail to conduct the suit in accordance with the agreement by spending money to the extent of Rs 50,000 in the Original Court, you shall forfeit the amount spent by you till then. If you undertake to conduct our suit in the three Courts and if you are spending money, we shall have no right to say that you need not spend money for the original suit or appeal nor to arrange for money required therefor elsewhere. But we shall get the suit and appeal conducted only with the money advanced by you. It is agreed that we should not compromise or withdraw this suit without your consent; that, in case you think that, under the then existing circumstances, it is better to compromise, we should consent to it; that, when we represent to you that it is better to compromise, you should consent to it; and that out of the amount that may be got in the said compromise we should pay you the amount advanced by you with interest at 1 per cent. per mensem from the respective dates of advance of the several sums and also give you 3|32 of the property remaining after deducting the aforesaid. It is further agreed that, soon after the suit is disposed of, we should execute documents in your favour as per all the abovementioned terms and that, as soon as we get possession of the property, we should put you in possession of the property as per those documents. We and our heirs are bound by the aforesaid conditions and we execute this agreement with our free consent.

"(Sd.) POOSAPATI RAMACHANDRA RAJU,

"(Sd.) POOSAPATI RAMA RAJU,

"(Sd.) POOSAPATI BUCHI APPALA RAJU.

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma *v.* Sri Poosapati Venkatapati Raju.

" *Witnesses* :—

(*Sd.*) *Vempati Brahmayya Sastri,*

(") *Sekharamahanti Venkatappiah,*

(") *Gottimukkala Lakshmi Narasimha Raju,* now residing at Tuni.

(") *Bhupatiraju Venkatakrishnam Raju.*

" *Written by* :—

Dantuluri Sanyasi Raju."

After the action had proceeded for some time, and the Rajah had advanced Rs. 66,000, it was found that more money was needed, and so, as the result of further negotiations, another agreement was on the 14th August, 1907, entered into beweecn the parties as follows :—

"Agreement dated 14th August, 1907 corresponding to Wednesday the 5th Sravana Sudham of Plavanga year, executed by Poosapati Ramachandra Raju, son of Sanyasi Raju and his undivided sons, Rama Raju and Buchi Appala Raju *alias* Acharya Raju, Kshatriyas, Mokhasadars, residing in Poosapatirega, Rajah Vatsavaya Venkata Simhadri Jagapati Raju Bahadur, Zamindar, Taluk Kottam, etc., son of Sri Rajah Vatsavaya Suryanarayana Jagapati Raju Bahadur Garu, Kshatriya, Zamindar, residing at Tuni, Tuni Sub-District, Tuni Division, Godavari District.

"1. In the matter of the suit O. S. No. 18 of 1903 on the file of the District Court of Vizagapatam, instituted by the said Ramachandra Raju out of us, who is entitled to the estate of the late Sri Poosapati Ananda Gajapati Maharaja Garu after the death of the present Rajah of Vizianagram, because the defendants who are rich persons have won over and instigated all persons with whom we, owing to our want of money, had arranged to lend us money and prevented us from getting the money required for the expenses of conducting the said suit, because we are unable to advance money for Court costs, etc. because justice cannot be had in Courts without money being spent, and because we were absolutely in need of money for conducting the proceedings in Court, we requested you (to lend us) money and executed an agreement in your favour on 22nd May, 1906 stipulating among other conditions that you should lend us Rs 1,50,000 for conducting the proceedings of this suit ; that, as soon as the suit is decided in our favour, we should execute, register and give on a proper stamp paper a sale-deed in your favour in respect of 3|16 of the entire moveable property got by us thereby as consideration for the amount of principal and interest advanced to us by you for the conduct of the said suit and that as soon as the aforesaid suit property is put in our possession, we should deliver possession to you of the moveable and immoveable property thus sold to you. On executing this agreement, we have been receiving money from you and conducting the proceedings of this suit. As even the examination of witnesses in the Original Court is not yet over and as it would take a long time more, it appeared to us that the sum of Rs 1,50,000 which we requested you to lend us would not be sufficient for the expenses and that a larger sum would be required. Therefore we very reliably and definitely represented to

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

you that you should give us money upto a sum not exceeding Rs. 2,00,000 including the amount mentioned above, that as soon as the suit is decided in our favour, we would in addition to the 3|16th portion of the property already agreed to be sold to you out of the moveable and immoveable properties which we get in the suit, sell to you another 1|16, in all, 1|4th of the moveable and immoveable properties that we may get in the suit and also the flower garden site in Vizianagram and a hill tract 2 miles long and 1 mile broad already agreed to be sold to you wherever you may want out of the hill quarries existing in the said estate which would pass to us, by means of a registered sale-deed executed by us ; that, on our getting possession of the moveable and immoveable properties as per the decree, we would deliver possession to you of the moveable and immoveable property mentioned in your sale-deed. Thereupon you agreed (to our proposal). It is therefore agreed that you should advance for the proceedings of the said suit and appeal money upto a sum not exceeding the aforesaid two lakhs of rupees and within that (limit) as per the conditions mentioned below ; that in respect of the money advanced by you from time to time, detailed receipts for Vakil's day fees, etc., printing, stamps and house-rents should be furnished to you ; that as regards the whole of the balance, accounts of receipts and expenses should be rendered to you and for the sum so ascertained, you should obtain receipt from Ramachandra Raju out of us and with respect to the money that may again be required, you should, at the request of Ramachandra Raju out of us, advance money, look into accounts and get detailed vouchers for moneys spent as above-stated and settle accounts then and there without giving room for any disputes at a further time.

"2. Up to date, you have given us Rs. 66,000 from time to time for the conduct of the suit. The sum caused to be spent by you is Rs. 5,500 thus making a total of Rs 71,500. The sum which you, immediately after settling the accounts of credit and debit with regard to this (Rs. 71,500), agreed to pay for the balance remaining and for Court costs on the receipt of Ramachandra Raju out of us is Rs. 16,000. This being added to the above sum, the grand total is Rs. 87,500. As regards the balance remaining after deducting this, it is agreed that, out of the same, we should, on the receipt of Ramachandra Raju out of us, receive sums required hereafter for expenses in the Original Court after furnishing to you, as above-stated, accounts of receipts and disbursements in respect of the moneys we may by then have received. It is further agreed that on our rendering account of credit and debit as above-stated you should, within a week of our applying for money, pay the money required for the said suit.

"3. It is agreed that you should give the money remaining after deducting the expenses incurred for the said suit in the Original Court for expenses in the appellate Court, that we should render account for that also in the aforesaid manner, that you should be giving at the rate of Rs. 20,000 on the receipt given by me, Ramachandra Raju out of us within a week of our applying for money and that we should be rendering account for that also and be taking money again.

"4. It is agreed that for the money lent by you in the aforesaid manner for the expenses of the said suit in the Original Court, etc., interest should be calculated at the rate of 2 per cent. per mensem from the respective dates and be added to the principal once in every three months and that the amount

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma *v.* Sri Poosapati Venkatapati Raju.

so found due to you by us until we put you in possession of the moveable and immoveable properties agreed to be sold to you as consideration therefor, should be treated as the sale amount for the sale of the moveable and immoveable properties aforesaid and we and our heirs are also hereby strictly bound, as soon as a decree is passed in our favour, to convey to you and your heirs by means of a properly executed and registered sale-deed 1|4th share of the moveable and immoveable properties for which a decree may be passed in our favour and to place in your possession the 1|4th share of the moveable and immoveable properties as per your sale-deed as soon as the properties with regard to which a decree may be passed in our favour come into our possession.

"5. If, as soon as the suit is disposed of in our favour, we fail to execute and give a sale-deed to you according to the said agreement in respect of the 1|4th share of the moveable and immoveable properties which we may be declared entitled to in the said suit, or, after executing and giving such a deed, we fail to place the properties in your possession after they pass to our possession, or, after so executing a proper sale-deed and placing you in possession of the properties, we or our heirs raise any objection at any time and cause obstruction with regard to any item of the said moveable and immoveable properties and thus prevent you or the members of your family from enjoying the same, we shall, as regards the portion of the property which you and the members of your family are prevented from enjoying, give you such immoveable property as you may like, out of the properties that may remain in our possession after excluding the immoveable properties which may be given to those helping us in this suit and as regards the deficit of the immoveable property, it shall be made good by our giving to you as sale amount therefor in ten equal instalments in ten years an amount in cash equal to twenty times the net annual income thereon with interest at Re. 1 per cent. per mensem from date of default and for this money we and our heirs and our moveable and immoveable properties are liable to you and to the members of your family and we shall execute and give you a proper document for this and pay the money.

"6. It is agreed by us that we should not ask you to give us anything more than Rs. 2,00,000 for purposes of the said suit and that you need not pay anything more than that.

"7. It is agreed that, even if the amount spent for the said suit falls short of the said two lakhs of rupees, we should sell to you and place in your possession the 1|4th portion of the moveable and immoveable properties agreed to be given to you by us as stated above as consideration for the money so spent and the interest thereon at the above-mentioned rate, and that we should not ask you to give the money necessary to make up the two lakhs.

"8. It is agreed that, even though we may borrow money from others to conduct the suit on finding that the said two lakhs is insufficient for the said suit expenses, you need not pay that money to us, but we should, without any objection, sell and place in your possession and in the possession of your family members as consideration for the total amount of principal and interest found due to you, the 4th portion of the moveable and immoveable properties as agreed upon as soon as a decree is passed in our favour and the said moveable and immoveable properties come into our possession.

P. C.

Sri Raja Vatsavaya Venkata Subhadra-yamma *v.* Sri Poosapati Venkatapati Raju.

"9. It is agreed that, if you should expend money out of the said two lakhs for the expenses in the Original Court only but you do not like and therefore cease to spend money for the appeals, and even if we borrow money from others, conduct the appeals and obtain justice, we and our heirs should execute a registered sale-deed and immediately place in your possession and in the possession of your family members 1|12th portion out of the said moveable and immoveable properties as soon as the said moveable and immoveable properties come into our possession as consideration for the expenses in the Original Court and the interest thereon as mentioned in para. 4. It is agreed that you should without fail meet the whole of the expenses incurred in the Original Court.

"10. We shall not compromise with the defendant, or file *razinamah* or withdrawal without your consent.

"11. It is agreed that, if Mr. Krishnaswami Aiyar, High Court Vakil, who is working on our behalf in this suit advises us from the then existing circumstances of this suit, that it would be better for us to compromise, we should agree to it and compromise or withdraw the suit.

"12. Moreover, out of the moveable and immoveable properties that may be obtained by such compromise, etc., we shall first pay to you the principal money advanced by you together with interest at Re. 1-0-0 (one rupee) per cent. per mensem from the respective dates, and out of the moveable and immoveable properties that remain after so giving away (to you) we shall at once execute and give you a proper sale-deed and place in your possession 3|32 share. All of us and our heirs are liable to you and your family members according to all the aforesaid terms and are also bound to give effect to them without fail. This agreement is executed with our whole-hearted consent.

(Sd.) Poosapati Ramachandra Raju.
(„) Poosapati Rama Raju,
(„) Poosapati Buchi Appala Raju *alias* Acharya Raju.

Witnesses to this :—

(Sd.) Poosapati Jogi Jagannadha Raju
(„) Dantuluri Venkatavijaya Gopala Raju.
Handwriting of Gopala Raju, son of Vejarla Venkatapati Raju.

Towards the end of 1907, however, the Rajah made his peace with the Maharani of Vizianagram, with whom he had been on bad terms, and complained that the pleaders engaged in Suit No. 18 of 1903 had already been paid Rs. 12,600 for fees and expenses, though, as he alleged, they had agreed to act without remuneration and ultimately, in January 1908, he declined to advance any further funds until the sum so paid out had been recovered and expended for the pending suit. While correspondence on the subject was proceeding, the suit

P. C.

Sri Raja Vatsavaya Venkata Subbadrayamma v. Sri Poosapati Venkatapati Raju.

was dismissed by the trial Judge, and respondents 2 and 4 thereupon preferred an appeal (No. 114 of 1909) to the High Court at Madras. In 1911, the Rajah of Tuni, and Mr. V. Krishnasami Aiyar (mentioned in the agreement of 14th August, 1907, *supra*) successively died and on the 12th March 1913, a compromise was effected between the parties to the appeal which was incorporated in a decree of the High Court in these terms :—

"1. Sri Poosapati Ramachandra Raju Garu.

2. Sri Poosapati Venkatapati Raju Garu, having died, his legal representatives, Sri Poosapati Venkatapati Raju Garu.

3. Sri Poosapati Ramabhadra Raju Garu.

4. Sri Poosapati Kumara Venkatapati Raju Garu.

5. Sri Rajah Chitti Babu Vijayarama Raju, Maharaja of Vizianagram.

6. Sri Poosapati Alaka Narayana Gajapati Raju Bahadur, minor, by guardian J. C. H. Fowler, Esquire.

7. J. C. H. Fowler, Esquire, Trustee ...*Petitioners.*

"Petition praying that in the circumstances stated therein the High Court will be pleased to issue a decree in terms of the compromise in Appeal No. 114 of 1909.

"This appeal and the memorandum of objections coming on for hearing on Monday and Tuesday, the 10th and 11th days of March, 1913 and the parties having presented to-day the C. M. P. No. 668 of 1913, comprising the suit, and applying that the suit may be compromised in the terms of an agreement in writing, dated the 12th day of March, 1913 and made between the parties on the terms hereafter set forth, *viz.* :—

"1. The appellants herein fully admit the validity and the binding character of the adoption of the 1st defendant (Chitti Babu Vijayarama Raju) by the late Maharani Alakarajeswari to her husband, Sri Mirza Poosapati Vijayarama Gajapati Raju Maharajah Bahadur, K. C. S. I, of Vizianagram and agree for themselves and their heirs to be bound by the said adoption and the 1st defendant shall be entitled to hold as such adopted son the impartible Zamindari of Vizianagram and all the properties in suit and all other rights, properties, etc., appertaining thereto, including Devasthanams, etc. and neither the plaintiffs nor their heirs shall ever call in question the validity and the binding character of the said adoption.

"2. The appellants fully accept the construction placed by the District Judge on the last will and testament, dated 22—7—1896 of the late Sri Ananda Gajapati Raju, Maharajah of Vizianagram, and accept his decision that the said Vijayarama Raju Garu took under the will a full and absolute estate of inheritance and is entitled to the whole of the Vizianagram Zamindari and all other properties absolutely under the said will. They agree to be bound by the construction placed by the District Judge upon the fifth para. of the said will and further agree that the said absolute estate of Chitti Babu Vijayarama Raju is not liable to be defeated on any ground or in any

P. C.

Sri Raja Vatsavaya Venkata Subhadra-yamma *v.* Sri Poosapati Venkatapati Raju

contingency whatsoever and that the powers provided for in the said fifth para. of the will are altogether invalid and inoperative.

"3. The appellants further agree for themselves and their heirs never to claim the Vizianagram Zamindari and all its Devasthanams and all other properties in suit, either on the death of the 1st defendant or thereafter.

"4. The appellants also fully accept the title of Alaka Narayana Gajapati Raju, the son of the 1st defendant (Chitty Babu Vijayarama Raju), to whom the Zamindari had been surrendered and transferred by the 1st defendant and he is and shall be declared to be absolutely entitled to the estate of Vizianagram and all other suit properties, their appurtenances, accretions, etc.

"5. The respondents admit that the appellants are separate Gnatis of the late Ananda Gajapati Raju Maharajah and of the degree according to the pedigree as put forward by them and as found by the District Judge to be true and further agree, (*a*) to pay a sum of Rs 2,50,000 (Rupees two lakhs and fifty thousand only) to the 2nd appellant herein on behalf of and for the benefit of all the appellants ; (*b*) to pay the 1st appellant a sum of Rs. 2,400 (Rupees two thousand four hundred only) and to pay each of the other appellants, a sum of Rs 866-10-8 (Rupees eight hundred and sixty-six, annas ten and pies eight only) annually from the 3rd April, 1913 payable on the 3rd of every month in equal instalments and to continue to pay for ever to the appellants and their heirs the monthly sums as above mentioned ; (*c*) to give to the second appellant herein for and on behalf of all the appellants either the Kotti house in Lanka Vidhi or Majji Valasa Thadlavari house in Vizianagram, provided that the appellants and the first appellant's (Ramachandra Raju's) two sons execute a deed of compromise embodying all the terms of the compromise petition.

"6. The respondents also agree to execute a document, agreeing to pay the aforesaid sum of Rs. 2,50,000 (Rupees two lakhs and fifty thousand only) and granting the aforesaid monthly payments to the various appellants and their heirs hereditarily as aforesaid and conveying one of the houses aforesaid absolutely in favour of the 2nd appellant.

"7. Each party will bear his or their own costs of this appeal and the memo. of objections.

"8. Both the parties therefore, pray that this Court may be pleased to record this compromise and to pass a decree in accordance with the terms of the compromise, dismissing the appeal preferred by the (plaintiffs) appellants and allowing the memo. of objections preferred by the respondents as regards the validity of the 1st defendant's adoption and by embodying in the decree of this Honourable Court the declarations as to the title of the 1st defendant as adopted son and the title of the 1st defendant and now of the 2nd defendant to the estate of Vizianagram and all the other properties and rights connected therewith on the footing of the will and adoption.

"And it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, the 2nd respondent, this Court doth sanction the said compromise on behalf of the said minor, and this Court recording the said compromise with the consent of all the parties thereto doth in modification of the decree, dated the 25th day of July 1908 of the District Court of Vizagapatam in O. S. No. 18 of 1903, order and decree that this appeal

P. C.

Sri Raja Vatsavaya Venkata Subbadrayamma v. Sri Poosapati Venkatapati Raju.

be, and hereby is, dismissed, and the memorandum of objections allowed so far as it relates to the declaration of the validity of adoption, and doth declare

(i) that the 1st defendant, as the validly adopted son of the late Sri Mirza Poosapati Vijayarama Gajapati Raju Maharajah, and under the will of the late Sri Ananda Gajapati Raju Maharajah, is entitled to the whole of the property in the suit ;

(ii) that the appellants are the gnatis of the late Sri Rajah Ananda Gajapati Raju Maharajah according to the pedigree appended to the judgment of the lower Court.

"And this Court doth further order and decree that each party do bear his or their own costs in this appeal.

(Sd.) ARTHUR DAVIES,

Dy. Registrar, Appellate Side."

Shortly thereafter, on the 4th April 1913, the appellant instituted the present suit (No. 10 of 1913) in the Court of the Subordinate Judge, Vizagapatam, alleging in addition to the facts set out above that, out of the properties secured under the aforesaid compromise, she was entitled, according to her computaton to Rs. 1,68,629 and a 3|32 of Rs. 81,371 of the annuity of Rs. 5,000, and of the house. By a subsequent amendment of her plaint by leave, she alleged alternatively that, it having become impossible by reason of death, for her husband to be a party to the compromise, and for the assent thereto of Mr. V. Krishnaswami Aiyar, the contract between the parties became void, and that, under S. 65, Contract Act, she was entitled to a refund of the moneys actually advanced by her deceased husband, with interest, in the event of her being found disentitled to specific performance of the contract to give a share in the balance of the compromise amount and in the annuities.

The following issues were framed for trial :—

"(1) Whether the agreements of 1906 and 1907 alleged by the plaintiff are open to the objections raised in paras. 27 and 28 of the 1st defendant's written statement and, if so, whether plaintiff is not entitled to the specific performance of the agreements ? (*a*) Whether the 1st agreement has been superseded by the 2nd agreement ?

(2) Whether the plaintiff's husband was justified in breaking the contract between him and the 2nd defendant, if he was not, whether he is entitled to the relief claimed ?

(3) Whether the agreements of 1906 and 1907 are valid as against the defendants in view of the trust-deeds of 1903 and 1906 executed by the 2nd defendant ?

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapat Venkatapatil Raju.

(4) Whether the suit is barred by limitation ?

(5) What is the amount advanced by plaintiff's husband under the suit agreements to 2nd defendant ?

(6) Whether plaintiff has got any and what cause of action against defendants 1, 5 and 6 ?

(7) Whether the suit agreement provides for the contingency that actually happened, if not, what is plaintiff's remedy ?

(8) To what share, if any, is each of the defendants entitled ?

(9) Whether the plaintiff is not entitled in law to adduce evidence to prove the allegations made in para. 13 of the plaint ?

(10) To what relief, if any, is plaintiff entitled, even if it should be found that he broke the agreements and whether in such case the claim is barred?

(11) Whether the contract has become incapable of performance as contended by the defendants ?

(12) If so, whether plaintiff is entitled to any and what remedy under S. 65 of the Contract Act and against all or any and which of the defendants ?

(13) Whether S. 65 of the Contract Act does not apply to the case?"

and on the 10th December, 1915, the Temporary Subordinate Judge (V. Narayanaswami Ayyar, Esq.) delivered his judgment, decreeing that the defendants pay to the plaintiff the sum of Rs. 1,91,059, towards which the sum comprised in Suit No. 18 of 1903 and the appeal therein (No. 114 of 1909) was to be liable. On appeal, the High Court (Ayling and Seshagiri Ayyar, JJ.) reversed the decree of the Subordinate Judge, and dismissed the plaintiff's suit. The appellant thereupon obtained leave to appeal to His Majesty in Council. Respondents 3 and 4 having since compromised the appeal upon terms sanctioned by the Privy Council, the appeal was proceeded with as against respondents 1, 5 and 6 only.

Upjohn, K. C., De Gruyther, K. C. and *Narasimham* for appellant :—There was no breach of contract by the plaintiff or her husband (the Rajah), and the contract is not at an end, but still subsisting. Refund of the advances with interest is claimable under S. 65, Contract Act. The fund obtained under the compromise in Appeal No. 114 of 1909 is the same as that contemplated in the agreements of 1906 and 1907, and the High Court was wrong in holding otherwise.

Kenworthy Brown for respondents 1, 5 and 6 :—These respondents were not parties to any agreement with the Rajah

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

of Tuni, and the agreements sued on (of 22nd May, 1906 and 14th August, 1907) were nowise binding on them, or on the assets which came into their hands, and there is no cause of action against them. The moneys advanced, moreover, were not a loan, there were no covenants to pay by any of the defendants, and there is no equitable assignment or charge. In fact, the agreement of 1907 was broken by the Rajah, and there cannot be an equitable assignment after March. Besides, the hypothetical points of litigation cannot be made the subject of equitable assignment, nor will Courts of Equity enforce such. The agreement was inequitable, and for maintenance of litigation in which the Rajah had no interest, and, therefore, cannot be upheld so as to ground any relief.

8th May, 1924. The Judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON :—The suit out of which this appeal has arisen was instituted in the Court of the Subordinate Judge of Vizagapatam on the 4th April, 1913, by the plaintiff—the present appellant—the widow of the Rajah of Tuni deceased, who died in the year 1911, against the six respondents named to recover the sum of Rs. 1,68,629 and to obtain a declaration that this sum was well charged upon a certain sum of money received by the respondents, under a certain decree dated the 12th March, 1913, styled a compromise decree, made in a suit, No. 18 of 1903 and also for payment of three thirty-seconds of what remained of the sum received under such compromise after payment of the sum of Rs. 1,68,629. The Subordinate Judge, on the 6th December, 1915, made a decree in favour of the appellant, the plaintiff in the suit, for the sum of Rs. 1,91,058, and also made the declaration asked for to the effect that this sum was well charged on the sum paid to the respondents in pursuance of the compromise decree. The learned Subordinate Judge decided against the appellant on the other matters claimed, and no appeal has been taken by her against this decree on these latter matters. An appeal was, however, taken by the defendants to the High Court of Judicature at Madras. That Court pronounced a decree dated the 21st March, 1918, reversing the decree of the Subordinate Judge and dismissing the appellant's suit with costs. From this latter decree, the appellant has appealed to this Board.

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

The original suit No. 18 of 1903 was decided by the first Court against the respondents 2 to 4 in 1908, and they preferred an appeal to the High Court, which was numbered Appeal No. 114 of 1909.

In 1913 a compromise petition was filed in the above Appeal No. 114 of 1909 in the High Court, and on the 12th March, 1913, a decree was passed in accordance with the compromise by which the 1st respondent in this appeal was to receive a sum of Rs. 2,50,000 on behalf of and for the benefit of all the respondents, the 2nd respondent was to receive an annuity of Rs. 2,400, respondents 3 and 4 were to receive an annuity of Rs. 866-10-8 each, and the 1st respondent was to get a house for and on behalf of all the respondents.

Since the admission of this appeal the appellant and respondents Nos. 3 and 4 have entered into a compromise which has been recorded, and by an Order of His Majesty in Council leave was given to withdraw the appeal as against these respondents Nos. 3 and 4 and to proceed as against the other respondents on the terms, that even if the appellant should be successful in this appeal, costs in the Courts below should not be claimed by her against the respondents Nos. 3 and 4. This appeal is accordingly now proceeded with against respondents Nos. 1, 5 and 6 alone.

On the hearing of the appeal before this Board, Counsel on behalf of the appellant abandoned all claim for a decree against any of the respondents of a personal nature, and also abandoned all claim to a decree for payment of three thirty-seconds of the sum received on the compromise, and has confined the relief he asks for to having it declared that a sum of Rs. 92,000 with the accruing interest thereon, at the rate specified, is well charged upon the sum of 2 1|2 lakhs received by the respondents in the compromise. Though this is the sole relief asked for, the facts upon which the appellant depends are of a somewhat complicated nature, and must unavoidably be unravelled at some length in order to be adequately weighed and considered and the correct conclusion drawn from them. The Maharajah of Vizianagram, who owned an estate of that name, died on the 22nd May, 1897, having made a will by which he devised this estate to one Rajah Chitti Babu for life. This devisee may for convenience sake be styled the tenant for life, as he would be in England, though that is not, in strictness, according to Indian Law, his true position. The testator

P. C.

Sri Raja Vatsavaya Venkata Subbhadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

made no disposition of the absolute interest in his estate. As to that he died intestate. Ramachandra Raju, respondent 2, claimed to be the heir of the deceased Maharajah, as his nearest agnate, and by the joint operation of the Hindu Law and the Maharajah's will claimed to be entitled to the absolute interest on the aforesaid estate subject to the life interest of the so-called tenant for life. He was confronted, however, with this difficulty in asserting his claim, namely, the fact that the mother of the deceased Maharajah contended falsely, as Ramachandra Raju alleged, that she had adopted the tenant for life as the son of her deceased son, and that this adoption defeated Ramachandra Raju's title, as it undoubtedly would have done, if the adoption was validly made. In this state of things Ramachandra Raju resolved to assert his title, and thus to test in a Court of Law the validity of the alleged adoption of the tenant for life.

He was, however, a poor man. He apparently realised that the suit would be an expensive one, and that it would be absolutely necessary for him to induce some persons to advance to him the money necessary and sufficient, to prosecute the suit. To effect this purpose he took a step, the object of which is not very apparent and the result of which has undoubtedly proved embarrassing. The day before he instituted the suit to establish his title, namely, on the 12th July, 1903, he executed a deed of trust, by which, after reciting the death of the Maharajah, the making of his will, the devise to the tenant for life, the pretended adoption by the testator's mother, and alleging that it was necessary for him to take proceedings, he appointed Poosapati Venkatapati Raju Garu, (hereinafter referred to as the original trustee), trustee of all the property in which he, Ramachandra Raju, claimed to have a vested interest in remainder as heir of the deceased Maharajah in trust to administer the fifteen-sixteenths of the same for his, the settlor's, own benefit, and one-sixteenth of the same for the benefit of two persons named, namely, respondents Nos. 5 and 6 in the present suit.

There is nothing to show that these two latter beneficiaries were in any way connected with the settlor or had any claim upon his bounty. The provision thus made for them was, as far as can be seen, a voluntary gratuitous gift. It is plain that the property thus put in trust by this deed was all the property the settlor would have been entitled to as heir

P. C.

Sri Raja Vatsavaya Venka a Subh drayamma v. Sri Poosapati Venkat. pati Raju.

Lord Atkinson.

of the deceased Maharajah had there been no adoption of the tenant for life, or had that adoption been invalid. Each one of these three beneficiaries, the settlor and respondents 5 and 6, had interests in the litigation identical in character though not in equal value, in this sense that each would gain his share if the suit should succeed, and each would lose everything if it should fail. In addition, powers were, by the trust deed, conferred upon the trustee and upon the settlor respectively, which were both wide and important. The words conferring them run thus :—

"Therefore you (*i. e.*, the Trustee) should not only manage the trust property subject to the arrangements I may make regarding the consideration for your trouble, etc., and other matters, but also full authority is given you to conduct suits, etc., either jointly with me or separately and to manage it in such a way as you may think fit for the preservation of the properties."

Having regard to this last provision it is clearly the view of their Lordships that the trustee would have been acting within his express powers, if, having money of his own at his command, he thought proper to advance it, or some of it, to finance the contemplated litigation directed to secure and preserve the trust property for the purpose of the trust, by establishing that the alleged adoption never took place or was invalid and that therefore the settlor was the lawful heir of the deceased Maharajah, and in the event of that suit being successful would have been entitled to a lien on the property gained for the sum advanced. And their Lordships further think that if the trustee, not having money of his own available, borrowed money from a third party for the purposes above mentioned and actually used it to promote those purposes, then, in case the litigation were successful, the person who advanced the money would be entitled to stand towards the trust property in the place of the trustee and be entitled to a similar lien on that property. Their Lordships are further of opinion that if the settlor, with the assent and concurrence of the trustee, borrowed money absolutely necessary to finance the suit, from a third party for the purposes above mentioned and so applied it, then, in the event of the litigation being successful, the person who advanced the money would be equally entitled standing in the shoes of the settlor to a lien on the property preserved for the trust by his outlay.

The contemplated suit was, on the 13th July, 1903, commenced in the District Court of Vizianagram. Its number in

P. C.

Sri Raja Vatsavaya Venkata Subbadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

that Court was O. S. No. 18 of 1903. The plaintiffs in it were the original trustee and the three beneficiaries, namely, the settlor as to fifteen-sixteenths of the trust property and respondents 5 and 6 as to one-sixteenth of it. These three beneficiaries were the absolute owners in equity of the trust estate if the adoption proved invalid. The relief prayed for was (1) That it might be declared that the settlor, as the nearest heir of the late Maharajah, was entitled to the vested remainder in the estate of Vizianagram after the demise of the present Zemindar (*i. e.*, the tenant for life). The settlor and these two beneficiaries were therefore in the position of joint adventurers in this litigation, in which success would bring much gain for each, and failure absolute and complete loss to each. The efforts these adventurers made to obtain the necessary funds to prosecute the suit, of which they themselves were entirely destitute and were unable to supply, are detailed by the witness Lakshmi, the private secretary of the Rajah of Tuni, from whom the necessary funds were ultimately obtained. The evidence of this witness, which, save as to one matter to be mentioned presently, is practically uncontradicted, is of the utmost importance. He said a body of people came to have an interview with the Rajah of Tuni, his master. That the original trustee, the settlor, and two beneficiaries, respondents 5 and 6, and the two sons of the settlor, were members of this body, that they asked the Rajah of Tuni to help them in the suit O. S. No. 18 of 1903, in the Vizagapatam District Court, that they represented that other persons who had promised to assist them had failed them, that a vakil then named (since deceased) had told them that the settlor had a good case, represented that unless the Rajah of Tuni advanced money to finance the suit the settlor would lose it, and that if he succeeded in the suit the Rajah of Tuni would gain as well as the whole Kshatriya Community. That the original trustee and respondents 5 and 6 joined in making these requests, they were asked to sign the (*sic*) agreement. The trustee said the second defendant (*i. e.*, the settlor) was a poor man, that he was plaintiff in the suit, that they were conducting the litigation for him ; that fearing that he might collude with the Vizianagram estate, they got the trust deed, and so (*i. e.*, in consequence) the settlor only must enter into the agreement and that a draft of Ex. A (*i. e.*, the agreement of the 22nd

P. C.

Sri Raja Vatsava a Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

May, 1906) was produced, but the witness does not know who drew it. These two beneficiaries, respondents Nos. 5 and 6 in the present suit, filed, on the 21st July, 1913, two written statements. They are identical in terms. They both deny that they had anything to do with the negotiations which led up to the agreement of the 22nd May, 1906, or with those which led up to that of the 14th August, 1907. As to the first of these negotiations, they do not specifically deny a single statement deposed by the witness Lakshmi, who knew them all, the original trustee, the settlor, his two sons, Nos. 3 and 4, as well as Nos. 5 and 6 and said they all came to his master in a body.

Nos. 5 and 6 do not assert they did not interview the Rajah of Tuni on the occasion named. They do not deny that advances of money were prayed for from the Rajah and obtained, nor explain how it was that as the advance of money to conduct the suit just instituted would, if successful, have secured to them one-sixteenth of the trust estate, they took no part in the negotiations to obtain the necessary money to finance their own suit. They were not examined as witnesses in the suit out of which this appeal has arisen. They were important witnesses if their allegations were true. It appears to their Lordships that there is only one rational explanation of their absence from the witness-chair, namely, their well-grounded fear of cross-examination. If their statements be true, the evidence of Lakshmi must be a wicked and deliberate concoction. Their Lordships do not think it is that. They think it is a truthful account of what took place in his presence ; they accept it and rely upon it, while they look upon the statement of Nos. 5 and 6 in reference to the negotiations, out of which the agreement of the 22nd May, 1906, sprang, as wholly unreliable.

Upon this supposition it is well to consider what was in reality the true nature and effect of the arrangement come to by all the parties concerned on the occasion of this visit to the Rajah of Tuni. The suit recently started dealt with the whole *trust* property. The negotiation to have such a suit financed necessarily dealt with the whole trust property. The settlor could, *prima facie,* by signing the agreement for himself alone only bind his own interest in the trust property. That would not have sufficed, and therefore when, of the three beneficiaries only one signed the agreement designed to affect the

P. C.

Sri Raja Vatsavaya Venkata Subbadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

whole trust property and by its very terms did so, this one must, in the circumstances already detailed have signed it not only for himself, in his own right, but as agent, accredited in that behalf, of his co-beneficiaries. In all the transactions which succeeded, the advancing of the money, the accounting for the money, and the direction of the steps to be taken in the suit, the two beneficiaries do not appear to have taken any independent or active part. From May, 1906, onward, the settlor was regarded as the manager the *dominus litis* in the whole business. He was never removed from his position, his authority to act as the agent of his co-beneficiaries never questioned or withdrawn. These two co-beneficiaries of the settlor make in their written statements, the case that they are not parties to the agreement of the 22nd May, 1906, or that of the 14th August, 1907, and are therefore not bound by either. If by this they mean that they have not each by his own hand signed and thus executed them, it is true ; but if it means that those agreements were not signed by the settlor as the accredited agent of his co-beneficiaries and on their behalf, it is in their Lordships' view quite untrue. As this point was never made until over Rs. 1,00,000 had been advanced by the Rajah to finance the suit, in which they were co-plaintiffs, it is in addition dishonest.

The original trustee, Poosapati Venkatapatiraju, died during the progress of this suit No. 18 of 1903, and his nephew, the present respondent No. 1, was by a deed, dated the 17th December, 1906, appointed a trustee in his place, and accordingly added as a plaintiff in that suit.

It was contended by Mr. Upjohn on behalf of the appellant that the agreement of the 14th August, 1907, was not a substitution for the earlier agreement of the 22nd May, 1906, but a supplement to the latter. It is therefore necessary to examine the provisions of both to determine whether the earlier agreement is superseded by the second or only added to by it. The parties to the first are the Rajah of Tuni of the first part and the settlor and his two sons, respondents 3 and 4 of the second part. The word " we " is used throughout this agreement as well as throughout that of the 14th August, 1907, to indicate, it appears to their Lordships, all the plaintiffs in the suit not merely the settlor and his two sons, the executing parties to the agreement in each case. The Rajah by the earlier agreement undertook to advance at most Rs. 1,50,000 to

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma *v* Sri Poosapati Venkatapati Raju.

Lord Atkinson.

finance the suit started by the settlor, O. S. No. 18 of 1903, in consideration for which, if the suit should be successful, three-sixteenths of the moveable and immoveable property in dispute should by sale deed be conveyed to him, the Rajah. Should the whole of this sum not be needed for, or not be actually applied to financing the suit in the lower Court, the unexpended balance should be deposited with a person interested in both the Rajah and the settlor to be spent by the latter in financing the suit in the Appellate Court on appeal from the District Court.

Then follows a paragraph, No. 3, clearly providing that the Rajah was not to be bound to advance the large sum of one lakh for the above-mentioned purpose, but that if he did not want to spend the money claimed to conduct the suit in all the three Courts, he should only be bound to advance Rs. 50,000 for the prosecution of the suit in the original Court and was not to be bound to spend anything more than that. A further provision then followed to the effect that though the Rajah might only finance the suit in the original Court and should refuse to make further advances, and they (*i. e.*, the plaintiffs) should be obliged to get financial help elsewhere and conduct the appeals themselves, they should, as soon as they get possession, sell to the Rajah by means of a sale-deed, only one-third of the property agreed to be sold to him (*i. e.*, one-third of three-sixteenths) namely one-sixteenth of the property recovered by the Rajah's conducting the suit in all the Courts and would put the Rajah in possession of the same. It is then further provided that should the Rajah not like to take this sale deed they and their heirs should be bound to pay the Rajah the amount spent in the lower Court with interest at 2 per cent. per mensem from the date of the judgment of that Court, on the security of the property proposed to be sold to him. It was evidently contemplated by the plaintiffs in the suit and the parties to the agreement, that the suit might be compromised, while it was in the Appellate Court, as in fact it, subsequently, was, and accordingly elaborate provisions are introduced into the agreement dealing with that event and purporting to fix and determine what the rights of the respective parties should be, if the contemplated compromise should take place.

The first provision is to the effect that should this compromise take place while the Rajah was spending money

P. C.

Sri Raja Vatsavaya Venkata Subhadra-yamma *v.* Sri Poosapati Venkatapati Raju.

Lord Atkinson.

financing the suit, then *prima facie* the plaintiffs should pay to him the sums so spent by him with interest at 1 per cent. per mensem from the respective dates at which the said sums were spent. It is then provided that these sums should be derived out of the moveable and immoveable property obtained by the plaintiffs from the compromise, and further that out of the remnant which should remain of the moveable and immoveable property after deducting the principal and interest so paid, the parties designated should be bound to give the Rajah a three thirty-second share. Here are introduced some immaterial and, for the purpose of the matter criticised, irrelevant provisions, and then follow the clauses, which it may be best to quote, *in extenso* :—

"It is agreed that we should not compromise or withdraw this suit without your consent ; that, in case you think that, under the then existing circumstances, it is better to compromise, we should consent to it ; that, when we represent to you that it is better to compromise, you should consent to it ; and that out of the amount that may be got in the said compromise we should pay you the amount advanced by you with interest at 1 per cent. per mensem from the respective dates of advance of the several sums and also give you three thirty-seconds of the property remaining after deducting the aforesaid. It is further agreed that, soon after the suit is disposed of, we should execute documents in your favour as per all the above-mentioned terms and that, as soon as we get possession of the property, we should put you in possession of the property as per those documents. We and our heirs are bound by the aforesaid conditions and we execute this agreement with our free consent."

The Rajah then made the advances necessary for financing this suit. In the agreement of the 14th August, 1907, it is stated he had advanced sums up to Rs. 71,500 in all, yet it is contended by respondents 5 and 6 in their written statements that they are not liable for, nor is their share of any property liable to be charged with, any portion of this sum given to their own agent to finance their own suit, which it is inconceivable, they did not know had been so advanced and applied. If the agreement of the 14th August, 1907, only supplemented but did not supersede the earlier one of May, 1906, it may well be that under the latter the Rajah would have been entitled, in the event of the suit being successful, to a lien on the property recovered in the successful suit. This point does not appear to have been specifically raised in this appeal and need not be dealt with. The sum of Rs. 71,500 so advanced was found to be insufficient, for the prosecution of the suit O. S. No. 18 of 1903, and a second agreement dated the 14th August, 1907, between the settlor and his two sons, respond-

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

ents Nos. 3 and 4 and the Rajah of Tuni was entered into by which the Rajah undertook to advance a sum not exceeding Rs. 2,00,000 for its further prosecution.

This agreement contained many special provisions with which it is necessary to deal at some considerable length for reasons which will presently appear. In it after reciting at considerable length some of the steps which had already been taken in the suit, the insufficiency of the advances, and the kindness of the Rajah in undertaking to advance two lakhs of rupees including the sum of Rs. 71,500 which he had already, under the previous agreement advanced it provided that as soon as the financed suit was decided in favour of the plaintiffs in that suit, they, the plaintiffs, would in addition to the three-sixteenths portion of the property recovered in the suit already agreed to be sold to him, sell to him another one-sixteenth, making together one-quarter of that property, and also a garden and a strip of quarry land therein described. It is then further provided that in respect of the monies portion of these two lakhs, advanced from time to time, detailed receipts of the Vakil's day fees, etc., printing, stamps, house rents should be furnished to him the Rajah, that is, as regards the whole of the balance accounts of receipts and expenses it should be furnished to him for the sums so ascertained, and for which sum receipts should be given by the settlor, and that with respect to the money that might again be required the Rajah should, at the request of the settlor, advance the money, looking into accounts and getting detailed vouchers for money spent, and then settle accounts without giving room for any disputes.

By the figures mentioned in paragraph 2 of the agreement it is shown that a sum of Rs. 87,500 was then due to the Rajah, and it is again provided that out of the balance remaining after deducting this sum, the plaintiffs should on the receipt of the settlor receive the sums required thereafter for the expenses in the original Court on furnishing to the Rajah as above stated accounts of receipts and disbursement of the money already received by the settlor, and further that the Rajah, on the rendering to him of the debtor and credit accounts as stated, would within a week of his being applied to for money required for the suit pay the same.

In paragraph three of the agreement there are further provisions for the advance of money to finance the suit in the

P. C.

Sri Raja Vatsavaya Venkata Subbadra-yamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

Appellate Court on accounts being rendered in the manner thereinbefore described. There is then a provision that if a decree in the suit should be given in favour of the plaintiffs one-quarter of the property for which the decree would be passed should by sale deed be conveyed to the Rajah.

And then come the three paragraphs dealing with a compromise of the suit upon the construction of which the High Court have mainly, if not entirely, founded the judgment and decree appealed from. These paragraphs run thus—

"10. We shall not compromise with the defendant, or file *razinamah* or withdrawal without your consent.

"11. It is agreed that, if Mr. Krishnaswami Aiyar, High Court Vakil, who is working on our behalf in this suit advises us from the then existing circumstances of this suit, that it would be better for us to compromise, we should agree to it and compromise or withdraw the suit.

"12. Moreover, out of the moveable and immoveable properties that may be obtained by such compromise, etc., we shall first pay to you the principal money advanced by you together with interest at Re. 1-0-0 (one rupee) per cent. per mensem from the respective dates, and out of the moveable and immoveable properties that remain after so giving away (to you) we shall at once execute and give you a proper sale-deed and place in your possession three thirty-seconds of a share. All of us and our heirs are liable to you and your family members according to all the aforesaid terms and are also bound to give effect to them without fail. This agreement is executed with our whole-hearted consent."

(Signed) Poosapati Ramachandra Raju.
Poosapati Rama Raju.
Poosapati Buchi Appala Raju *alias* Acharya Raju.

This agreement and the previous one of 1906 are, in the main, constructed on similar lines. The maximum sum to be advanced under the first was Rs. 1,50,000 and that under the second Rs. 2,00,000 but the distinguishing feature of the second is that strict accounts of the sums advanced and spent are to be kept, receipts given for those sums when received, all disbursements duly vouched, advances of further sums required and asked are only to be made when those receipts and vouchers have been given. There is nothing whatever to indicate that the entire trust property as distinct from the settlor's share of it is not dealt with. Nothing to suggest that the authority already conferred upon the settlor by the negotiation out of which the first agreement to act in the matter of obtaining funds to finance the pending action had been either limited or

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

revoked. In the absence of any provision indicating that result it must, in their Lordships' view, be held that this authority was continued. Death has been very busy with the chief actors in this business. Krishnaswami, the vakil mentioned in the attestation clause, died in the year 1911, as did also the Rajah of Tuni who is succeeded and represented by his widow. The settlor died immediately after the forwarding of the appeal to this Board and he is succeeded by his two sons. The widow, according to her counsel, does not claim that the sum of Rs. 92,000 due to her is a debt due on a loan. Neither does she claim to get specific performance of any contract giving her any property obtained by the compromise. She merely claims a lien on the sum of Rs. 2,50,000 paid under the compromise, for the sum of Rs. 92,000 for principal with interest on the sum she and her husband have advanced to finance the suit. This amount is admitted to be due. The Rajah of Tuni, seeing from such accounts as were furnished to him that very large sums, as he thought extraordinarily, large sums, had been paid to two vakils engaged for the plaintiffs in the suit No. 18 of 1903, objected to those items, and contended that these vakils had promised to act gratuitously, and that the sum paid should be recovered by action at law. He was proved to be wrong in this. It was shown that these vakils had not undertaken to work for nothing, but in addition to this he insisted that these alleged disbursements should, like every other disbursement, be vouched. In making this demand, he was, in their Lordships' view, perfectly justified by the terms of the agreement of 1907.

The Dewan of the Rajah of Tuni wrote to the settlor a letter dated the 19th January, 1908, stating that from the last credit and debit account sent by the latter on the 6th instant and from the like accounts sent earlier, it was seen that a sum of Rs. 10,450 was entered as day fees to M. R. Ry Bhupatiraju Raju and another sum of Rs. 2,165 was entered as fees to his brother contrary to the original arrangement, and that this sum should be recovered and expended for the future costs of the suit. It is then added : " In your credit and debit accounts you have not given details regarding some items. I shall write a letter soon about them. As soon as further money is required I shall send it as if this account of credits and debits had been settled." On the 28th January, 1908, the Rajah writes by this same Dewan the promised letter to the settlor. It

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

deals with numerous items of the debit and credit accounts furnished by the latter, covering the period from May, 1906 to January, 1907, and dealing with an expenditure of Rs. 49,017-10-7, including a sum of Rs. 35,000 entered as given for pleaders' fees and lodging expenses, house rents, typing charges, costs of stamps, amounts deposited in Court, interest said to have been paid by the settlor, expenses of clerks, etc. After this enumeration the following passages are to be found in the letter, "You have not, as per your agreement, yet sent the receipts and vouchers in token of the said sum having been paid to and received by the Madras vakils (already named). Please send the receipts and vouchers at once. You have also not given details regarding the amounts debited under lodging expenses and other sundry expenses, salaries, stamps, typing charges and rents. Please write details as to what period they were paid for and for what items they were paid and to whom they were paid."

A number of items including the vakils' fees appearing in the second credit and debit account for the period from January to August, 1907, are specifically mentioned, and it is expressly stated that the settlor has not sent receipts and vouchers from the persons to whom the sums mentioned are in the accounts stated to have been paid, and that unless the settlor sends these receipts and vouchers it is not possible for the Rajah of Tuni to settle the settlor's account of credits and debits, and that, moreover, he has not given details of the sums taken credit for. A number of small items are then dealt with and the settlor is informed that unless he furnishes details of these sums and receipts for them it is not possible to include them in the credit and debit account and to settle that account. The accounts covering the period from August, 1907, to the end of December of that year including credits and debits for a sum of Rs. 36,141-0-8 are then dealt with.

Credit is taken in this account for a sum of Rs. 27,000 stated to have been paid to the vakils already named. It is complained that vouchers are not sent for these alleged payments. The same applies to many named sums for which no details or vouchers have been given. Then came the following passages :—

"Therefore, not only should you immediately send us the receipts and vouchers for vakils' fees and other items in respect of the three accounts of credits and debits, but also you should immediately furnish us with details for

the items which bear no details. Though we had often requested your officials to furnish us with details, vouchers and receipts for the sums debited and though they promised to do so they have not as yet sent the same.

"Though we had sent moneys from time to time owing to confidence in you and on account of the urgent telegrams sent by you and your men, for money stating that the suit will be spoiled, without your furnishing us then and there full particulars for the items in your credit and debit accounts and without sending us the receipts and vouchers for the several items ; you have not sent us up to date proper explanation for the items of credit and debit. This is not proper."

These demands made by the Rajah through his Dewan are not extravagant or unreasonable in their nature. They are not only those which he was by the letter of his agreement of the 14th August, 1907, entitled to make, but such as according to business methods and practices he would be entitled to make in any business transaction such as he had embarked upon.

On the same date, the 28th January, 1908, a letter is written to the settlor on behalf of the Rajah of Tuni by apparently another Dewan referring to the credits taken for the sums paid to the two vakils, and winding up thus :—

"If, before you spend this money, you give proper particulars for such of the items as regards which no details were given or with regard to which there are disputes in the credit and debit accounts sent by you, and also send receipts and vouchers for the remaining items, namely, fees for Madras vakils, etc., we shall verify them, and if we find them correct and proper, we shall send money if any more money is still wanted for the purpose of this suit.

"Please to consider."

On the 14th February, 1908, the settlor replies to the Rajah's frequent demands for vouchers. In justice to the settlor the pregnant and important portions of this letter are set out especially that portion of it dealing with his excuse or rather justification for not furnishing to the Rajah the vouchers demanded. After praising himself for the way he has conducted the litigation and dwelling upon the difficulties he, the writer, had to encounter, he writes :—

"While such is the case and while not even a half of the amount agreed to be expended for the suit has yet been spent and while you are liable yet to pay the entire amount for the expenses of the suit and though the arrangement is that you should not fail to spend the amount required for expenses in this Court, and though you are fully aware of the fact that, in the event of your failing to do so, the agreement would be cancelled you have, without sending money when required by us, written this letter concocting false and unnecessary reasons. I do not know what reply you expected to be given thereto. For the money spent previously, the necessary explanations, accounts of credit and

P. C.
Sri Raja Vatsavava Venkata Subbadrayamma v. Sri Poosapati Venkatapati Raju.
Lord Atkinson.

debit and receipts bearing my signature have been sent. You need not question about accounts settled already nor is there any necessity for it. The last explanation and credit and debit accounts have been already sent. Without questioning it then, you are questioning it now entertaining something in your mind. If you wish to know the details hereof, I have no objection. Everything is clear from the accounts already furnished. When credit and debit accounts have been sent under my signature and on my responsibility I do not see proper reasons for the transaction being stopped."

This really means that no vouchers should be required or are needed for any items of expenditure entered in the credits and debits accounts he has seen fit to forward. It does not appear to their Lordships that matters of business are ordinarily conducted with such *uberrima fides* in accounting parties; but however that may be it is not the manner in which by the letter and spirit of the agreement of the 14th August, 1907, the Rajah was entitled to have their business conducted and in which the settlor was to conduct it. The letter winds up thus:—

"If you do not send money I shall take it that the agreement has not been acted up to and make other arrangements and conduct the suit as far as possible. Therefore I have made this fact known to you.

"Please to consider."

The vouchers demanded were in fact never sent to the Rajah of Tuni. This letter, in their Lordships' view, amounts to a refusal to send them, coupled with an intimation that if money be not sent, though they should not be furnished in the first instance, he, the settlor, would treat the contract of the 14th August, 1907, as at an end and make other arrangements. The settlor was by the terms of this contract bound to send vouchers of his disbursements whether demanded by the Rajah or not. The course he adopted amounted to a distinct breach of that contract, a violation of the obligations it imposed upon him. On the 21st February, 1908, the Rajah of Tuni replied to this letter of the 14th of that month. His reply contains the following passages:—

"We think that, having received so much money from us, you have, with some evil intention, written to us thus when the matter is about to terminate. According to the terms of the agreements you should furnish us with proper vouchers, receipts, and accounts for the total sum of about one lakh and odd sent to you previously. By merely stating that you have written and given explanations already and that you have sent receipts to the effect that you have received the sums sent to you from time to time, you cannot be deemed to have acted according to the terms of the agreement. You have acted in violation of the terms of the agreement and the oral conditions and in an unbusinesslike way. We are even now ready to send to you future money for just and necessary expenses."

The Rajah of Tuni never was furnished with even these vouchers. Not having been furnished with them he did not advance any more money to the settlor. He was, in their Lordships' view, amply justified by the provision of the agreement of 1907 in taking that course. The settlor being bound to furnish these vouchers, the Rajah might, if he wished, have taken this refusal to do so as a repudiation by the settlor of his contract, and have elected to treat the contract as at an end, but he did not do so ; on the contrary he states explicitly in this last letter that if the vouchers justifiably demanded were not sent and on examination found correct, he would not send any more money which might be needed for the conduct of the suit. The agreement of the 14th of August, 1907, has not been put an end to, it still exists. It is hardly necessary to point out that a party to a contract cannot put an end to it simply by committing a breach of it. The High Court had apparently supposed that this agreement no longer existed and were led into error thereby, since the Rajah never elected to treat the settlor's breach as a repudiation of the contract terminating it, as he might have done.

The only remaining point to be dealt with is the construction put at pages 299 and 300 of the record on the last three paragraphs of the agreement of the 14th of August, 1907. The judgment of the High Court runs thus :—

"The real difficulty arises from the use of the words 'moveable and immoveable properties obtained by *such* compromise' in cl. 12 of Ex. B 1. In cl. 9 a right is given to a twelfth of the property in case the whole of the expenses for the litigation in the first Court is borne by the lender. The clause says, "It has been agreed that you should without fail meet all the expenses incurred in the Original Court." Then comes cl. 10 which prohibits any compromise without the consent of the lender. Cl. 11 stipulates for an enforceable compromise in case Mr. Krishnaswami Ayyar gave his assent to it. Then follows the expression in cl. 12 which we have quoted. The words 'such compromise' can only refer to a compromise to which either the plaintiff's husband consented or which was brought about on the advice of Mr. Krishnaswami Ayyar. It is not disputed that in the present case the compromise which came into existence was not due to either of these two causes. The argument that although a compromise may be otherwise brought about, it was open to the plaintiff's husband to have accepted such a compromise because the provision for his assent and for Mr. Krishnaswami Ayyar's advice was for his benefit, does not meet the difficulty. The lien which is claimed is in respect of a property got under a particular compromise. Whatever may be the personal rights against the debtor, treating the money advanced as a loan, in order that the lien may fasten upon the compromise amount it must have relation to the two contingencies provided for in the agreement. The specific property or the identifiable property on which the lien is sought to be attached

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

is not the property which the parties contemplated by the agreement. We may state at once that we are in entire agreement with the contention of the learned vakil for the respondent that the mere fact that only Rs. 93,000 out of the contemplated two lakhs was advanced would not derogate from the lien if it otherwise existed......But as we pointed out, the identity of the property is wanting as cl. 12 creates a charge only on property secured by a compromise effected in one of the two ways suggested in the previous clauses. In this view our conclusion is that no lien was created over the money given by the plaintiff's husband. The theory that a lien on specific property would attach itself to the substituted property contemplates that the contract creating the original lien subsists. Granting for argument's sake that the lien on the compromise amount contemplated in cls. 10 and 11 will fasten itself upon the new compromise amount, the fact that before that compromise was affected, the parties had broken off relations would render this impossible.

The High Court treat the agreement embodied in paragraph 12 of the agreement of the 14th August, 1907, as one of those agreements dealing with property which at the time the contract was made was non-existent, which might never come into existence, but which, when it did come into existence would be operated upon by the agreement made before it existed. Their Lordships are not at all convinced that is the true view to take of this agreement of 1907 which must be considered as a whole. The main purpose and objects of its provisions are to finance a suit brought to establish title to an existing thing, an estate extending over a large portion of the earth's surface.

The point in controversy was not the existence or nonexistence of that thing, but which of two adverse claimants was entitled to a vested interest in it, subject to a life estate in one of them. The fruits of success in this action which would be gathered in by a decree would be this vested remainder. The fruit of it which would be gathered in by a compromise might be something different, but in essence the same. What the agreement really does is to provide that the fruit, which may be either moveable or immoveable property, shall be divided in certain shares between the parties to the agreement. The terms of the compromise might have been that one-half, or some other portion of the trust property, had to be given to the defendant by the plaintiffs, or that jewels which had been the property of the defendant for years might be given to the plaintiffs the two lakhs of rupees that he has given might all then have been in existence and in the defendants' possession, for years. No proof was given that the tenant for life was not possessed of this 2 1|2 lakhs of rupees, kept in his

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma *v.* Sri Poosapati Venkatapati Raju.

Lord Atkinson.

safe, or packed in his money bags long before the year 1907. On the face of clause 12 its language points rather to existing things than to non-existing things, and the agreement embodied in it is entirely different in its nature and character from an agreement assigning for a certain sum what, for instance, some relative might leave a contracting party, but who might never leave him anything whatever. In India, of course, champerty or maintenance is not illegal. In *Glegg* v. *Bromley* (1), Mr. Justice Parker, as he then was, stated the law upon this point, as was his custom, with great clearness and precision. In that case, according to the head note, one Mrs. G. was plaintiff in an action against one H. for false representation. She was also plaintiff in an action for slander against Lady Bromley. She was at the time greatly indebted to her husband, and she executed in his favour a deed of assignment whereby, after reciting that he had requested her to give him further security, which she had agreed to do, she assigned to him, " all that the interest sum or premises that she is or may become entitled under or by virtue of any verdict, compromise or agreement which she may obtain or to which she may become a party in or consequent upon the said action [*i. e., Glegg* v. *Bromley* (1)] or otherwise howsoever, under or by reason of the same to hold the same. .subject to redemption on payment of the money due to him. Both actions proceeded, that against H. resulting in a verdict for the defendant, with costs amounting to £ 218. That against Lady Bromley resulted in a verdict for the plaintiff Mrs. G. for £ 200 with costs. H. then took garnishee proceedings against Lady Bromley to attach this sum of £ 200, and Mrs. G.'s husband also claimed it under his assignment. It was held that the assignment was not an assignment of a mere expectancy or of a cause of action, but was an assignment of property that is of the fruit of an action as and when recovered, and that it was consequently not void under 13 Eliz. c. 5.

There is no distinction, and can be no distinction on this point between the fruits of an action which the plaintiff gets by compromise and the fruits he would receive by a decree or verdict in his favour. At page 490 Mr. Justice Parker is reported to have said :—

" It is to be observed that an equitable assignee of a chose in action whether it is legal or equitable could institute proceedings and maintain pro-

1. (1912) 3 K B 479, 490.

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

ceedings for its recovery. The question was whether the subject-matter of the assignment was in the view of the Court property with an incidental remedy for its recovery or was a bare right to bring an action either at law or in equity. With regard to the assignments of future property they stand, I think, on a totally different footing. Nothing passes, even in equity until the property comes into present existence. Only when this happens can the assignment attach and an interest pass........Even a solicitor who is conducting an action or suit may take a mortgage on the fruits for the purpose of securing the payment of his proper costs. He may not be able to purchase an interest in such fruits because of the doctrine of champerty."

In their Lordships' view the agreement embodied in paragraph 12 of the agreement of the 14th August, 1907, is an agreement by the plaintiffs to assign to others part of the fruits they may acquire in an action at law and therefore perfectly legal. Besides if even the money given to the plaintiffs in the compromise was a non-existing thing at the date of the agreement and only came into existence at the date of the compromise decrees the agreement of 14th August, 1907, which is still in existence, not terminated as the High Court erroneously supposes attaches to the things so coming into existence subsequently.

It is not very clear what the High Court means by the words "identity of the property" in the last of these passages. If the consent to the compromise by the two persons named in paragraph 12 of the agreement had the effect of transfusing into the property the parties might receive under it some quality, or attached to it some quality, then this language might be appropriate enough, but obviously their consent, if given, could not have any such effect. The property mentioned in paragraph 12 is of a universal and not of a special character.

The words are "moveable or immoveable property" which may be obtained by such compromise. That includes almost every conceivable kind of property, and the words of this paragraph would be satisfied if half the estate sued for, or another estate or the jewels of the tenant for life deposited in his safe, and the money packed in his money bags had been awarded under the compromise.

In the construction of written or printed documents it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply. The litigation which was to

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

be compromised was instituted in the year 1903. It had hung fire for four years when this agreement of the 14th August, 1907, was executed. The decision of the case in the original Court was not made till the year 1908. The appeal to the High Court was not lodged till the year 1909, and the compromise was not decreed till the 12th May, 1913. The plaintiffs in the suit and presumably their vakil knew all about these delays. The Rajah of Tuni, when he became a party to the agreement of 22nd May, 1906, must have also become aware of the negotiations out of which that agreement sprung and by the agreement itself of these delays ; unless these persons were all devoid of intelligence they must, thus forewarned, have anticipated that somewhat similar delays might occur in the future, and yet they are by the High Court taken to have provided expressly and with clearness that, unless the Rajah of Tuni if not the vakil also lived long enough to be able to consent and to consent to the compromise referred to in the clause, no compromise could be arrived at.

For in paragraph 10 it is expressly provided that the plaintiffs in the suit will not make any compromise " without your consent " which means of course the Rajah of Tuni's consent. In their Lordships' view, having regard to the abovementioned fact, the construction of these three cls. 10,11 and 12 of the agreement of the 14th August, 1907, which would make the giving of the consent of the Rajah of Tuni, and of the vakil named, a condition precedent which must be performed before any compromise could be validly made, is not their true construction. Both these men died in the year 1911. Having regard to the uncertainty of human life, which contracting parties when providing for possible future events must be presumed to bear in mind, it would be unbusinesslike and indeed irrational, if not absurd, for the parties in August, 1907, to have entered into such a contract as the High Court have construed this contract to be. Whereas it would be quite businesslike, quite rational and perhaps prudent for them to have entered into it if the things required to be done under it should only be required to be done where it was possible to do them. In their Lordships' view it is reasonably certain that parties to this agreement intended that this is what it should mean, and that therefore a term must be implied to exist in it, to the effect that the consent mentioned should be given when possible, and that the giving of consent of the Rajah himself to a compromise

P. C.

Sri Raja Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju.

Lord Atkinson.

accepted by his representatives was not such a condition precedent when it had become impossible for himself to give it. Their Lordships are therefore of opinion that the decree appealed from was erroneous and should be reversed with costs and the decree of the Subordinate Judge should be restored and they will humbly advise His Majesty accordingly.

The first, fifth and sixth respondents must pay the costs of the appeal.

Solicitor for appellant : *Douglas Grant.*

Solicitors for respondents *Chapman, Waller* and *Shephard.*

A. de M. *Appeal allowed.*

PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, LORD CARSON AND SIR JOHN EDGE.

(On Appeal from the High Court of Judicature at Bombay.)

Maharu Walad Lotu (Defendant No. 2) *Appellant**

v.

Khandu Walad Hari Patil (Defendant No. 1) and Nagó Ramchandra Kulkarni (Plaintiff) .*Respondents*

P. C.

Lotu v. Hari Patil.

Sale deed—Misrepresentation that it was a mortgage-deed obtained by—Evidence—Registration—Attestation to be appended at—Statement by vendor in, that he had signed deed not as sale deed, but as mortgage—Inference of misrepresentation from —Propriety.

On an issue as to whether the signature of a vendor to two sale deeds had been obtained under a misrepresentation that they were really mortgage deeds, the vendor gave no evidence as to any representation of that sort. In the attestation which had to be appended at registration the vendor in respect of the said sale deeds made a statement that he had signed the documents in question not as sales, but as mortgage deeds. The trial Judge held that that statement showed the impression that the vendor was under, and that it must be inferred that that impression had been induced by the action of the other party.

Held, that it was impossible to draw such an inference, and that the case set up was not made out.

13th May, 1924. Appeal from a judgment and decree (16th June 1920) of the High Court of Judicature at Bombay, reversing a judgment and decree (31st July 1918) of the First Class Subordinate Judge of Dhulia.

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*P. C. Appeal No. 56 of 1923. 13th May, 1924.

P. C.
Lotu
v.
Hari Patil.

On the 27th October 1913, Khandu Walad Hari Patil (Respondent No. 1) executed in favour of Nago Ramchandra Kulkarni (Plaintiff-Respondent 2) two sale-deeds in respect of certain parcels of land situate in the villages of Bhatkhade and Tade. As there were standing crops on the lands sold, it was agreed between the parties that possession was to be given to the purchaser after the removal of the crops at the end of the following month of "Paush" (on or about the 26th January, 1914). On the 1st November 1913, the purchaser presented both deeds to the local Sub-Registrar for registration, but, as the vendor did not appear at the time, the purchaser was obliged to take steps to compel his attendance, and the registration of the deeds was thus delayed for some time. In the meantime, on the 6th November, 1913, the vendor executed a sale-deed for the alleged consideration mentioned therein in favour of his nephew, Maharu Walad Lotu (Appellant) in respect of the same four parcels of land. This deed was presented for registration on the same date, and was registered on the following day, and the vendor, purporting to act under this deed, immediately put his nephew into possession.

Eventually on the 10th November, 1913, the two sale-deeds of the 27th October, 1913, were registered, the endorsement of the Sub-Registrar on each of them being to the effect that the vendor admitted their execution, but stated that he had not passed a sale-deed but a simple mortgage-deed, and that he had not received the consideration.

On the 17th December, 1913, the vendor executed another document in favour of Nago Ramchandra Kulkarni, wherein he admitted and acknowledged that the deeds of 27th October, 1913 were in fact sale-deeds, and not mortgage-deeds as stated by him before the Sub-Registrar, and continued :—

"I have given the aforesaid property to you by passing a sale-deed. But as I was not well on the said date the creditor presented the very document before the Sub-Registrar in the office at Erandol between the hours of 2 and 3 on the 1st of November, 1913. I not being present at that time, you got a notice issued to me through the Mamlatdar Office. Accordingly on the date fixed for the said notice I appeared and admitted having passed the sale-deed that day. But my nephew Maharu Lotu having persuaded me (to tell a lie) I stated that I had passed a simple mortgage-deed. I also stated that the consideration was not paid to me. But all this I stated owing to persuasion. All which I stated is null and void, because it was the intention of Maharu Lotu that I should not pay the moneys of the creditor and hence he persuaded me and got me to make a statement to that effect and again he obtained a sale-deed from me in respect of those very fields. The sale-deed is dated the 6th November, 1913, and

P. C.

Lotu
v.
Hari Patil.

is for Rs. 10,000 (ten thousand). But I did not receive a single pice in respect of the same. He took fiom me a hollow sale-deed with the intention of cancelling the sale-deed No. 1 and maintaining my right. I admit the sale-deed which I had previously passed. There remains no objection whatever on my part as regards payment of the consideration. On the date of the execution of the said sale-deed I shall without any objection vacate and deliver your fields as agreed upon. Should I or any one of my kinsmen or descendants cause any obstruction to you or refuse to deliver possession to you, I will file a suit and see that you get possession of the property at my cost. I have duly passed this receipt of my free will and pleasure and without taking any intoxicating drink."

Subsequently, the respondent No. 2 failed to obtain possession on the due date (26th January, 1914) stipulated under the deeds of the 27th October, 1913, and consequently on the 8th June 1914, he brought the present suit in the Court of the First Class Subordinate Judge of Dhulia against the vendor (Respondent No. 1) and his nephew (Appellant) relied upon his two sale-deeds of the 27th October, and 17th December, 1913, and challenged as collusive and without consideration the sale-deed of the 6th November 1913 executed by respondent No. 1 in favour of the appellant, and he therefore prayed for possession of the lands comprised in his sale-deeds and for mesne profits from the 26th January, 1914 until recovery of possession.

By his written statement, the respondent No. 1 (the vendor) alleged that he owed respondent No. 2 moneys under previous mortgages, and requested him to make up his account and take a mortgage-deed from him in respect of his old debt and a fresh advance, but that respondent No. 2 wrote out the sale-deeds in question and asked him to sign them, representing to him that they were mortgage-deeds, and accordingly he (Respondent No. 1) signed them. He, therefore, contended that the deeds in question were mortgage-deeds, and that, consequently, respondent No. 2 was not entitled to possession of the lands comprised therein. Defendant No. 2 (the present appellant) filed a separate written statement, adopting the plea raised by respondent No. 1, and further pleading that he understood that, at the time of the execution of the sale-deeds of the 27th October, 1913, respondent No. 1 was under the influence of liquor, and that he signed the same whilst he was drunk. With regard to his own sale-deed of the 6th November, 1913, he said that it was executed in pursuance of an agreement of sale, dated the 2nd October, 1913, and made between

respondent No. 1 and himself, and that his purchase had priority over that of the plaintiff.

The Subordinate Judge framed the following issues :—

"(1) Whether the defendants show that defendant No. 1 contracted to mortgage the property to the plaintiff ?

"(2) Whether it is shown by defendants that defendant No. 1 passed the sale-deeds, Exhibits 16 and 17, under the impression that they were to be mortgage deeds ?

"(3) Whether plaintiff had notice about the agreement of sale in respect of plaint lands passed between defendant No. 1 and defendant No. 2 ?

"(4) Whether defendant No. 1 was drunk at the time when (he) passed Exhibits 16 and 17, and whether plaintiff had caused him to be intoxicated with drink ?

"(5) Whether he was so drunk as not to understand the legal effects of Exhibits 16 and 17 when he passed them ?

"(6) If so, was plaintiff aware of this mental condition of defendant No. 1, when he got Exhibits 16 and 17 executed ?

"(7) What amount of mesne profits are to be awarded to the plaintiff?

"(8) To what relief is plaintiff entitled ?"

On the 31st January, 1916, the Subordinate Judge (H. A. Mohile, Esq.) delivered judgment. On issues 1 and 2, he held that the defendant No. 1 executed the documents of October and December, 1913 under the impression that he was executing them as mortgage-bonds, and not as sale-deeds. With regard to issue 3, he held that there was no evidence to show that the plaintiff had actual notice of the agreement for sale of the 2nd October, 1913. He decided issues 4, 5 and 6 (relating to drunkenness) in favour of the plaintift, and further held that the plaintiff's sale-deeds were entitled to priority over defendant No. 2's sale-deed, and that it was extremely likely that the latter was got up to defeat the plaintiff's claim. In the result, he ordered that the plaintiff's suit should be dismissed, and that the parties should bear their respective costs.

The plaintiff appealed, and on the 17th January, 1918, the High Court of Judicature at Bombay (Batchelor and Kemp, JJ.) delivered judgment in favour of the plaintiff as follows :—

"This is one of those quite common cases where a deed, which on the face of it a sale-deed, and which the apparent purchaser seeks to enforce as a sale-deed, is strenuously alleged by the appellant-vendor to have been in effect, and in the parties' intention, nothing more than a deed of mortgage. Cases of this character frequently give rise to some difficulty, partly because the lower Courts do not appear to have completely grasped the meaning of the Privy

P. C.
Lotu
v.
Hari Patil.

Council's decision of *Balkishen Das* v. *Legge* (1) and partly because the actual provisions of S. 92 of the Indian Evidence Act are not studiously considered. Undoubtedly the decision in *Balkishen Das* v. *Legge* (1) lays down that the provisions of S. 92 of the Evidence Act must be strictly enforced, and that unless a given case falls within any of the Statutory Provisos, oral evidence for the purpose of going behind the terms of the contract is not admissible. But it scarcely needs saying that there is nothing in the decision of *Balkishen Das* v. *Legge* (1) to remove from the Evidence Act the provisos to S. 92, and the first of those provisos enables a party to prove fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want of failure of consideration, or mistake in fact of law.

"Now apart from the disbelieved story of drunkenness which the 1st defendant ill-advisedly set up, it seems to me that his whole case here, properly understood, was the usual case which such a defendant makes, that is to say, the meaning of his allegations was this—that he being an illiterate man could not himself determine the character of the deeds which were drawn up, that he signed them in the belief that they were deeds of mortgage, and that that belief was fostered in his mind by some representation made by the plaintiff. That is what his case undoubtedly meant, and it appears to me that upon that interpretation there is nothing in the Evidence Act which would have disabled him from proving the circumstances, if he had evidence to prove them. The allegations, considered as allegations, fall clearly within the Proviso 1, and may, in my opinion, be proved. For that opinion I rely, if authority be needed, on the decision of the Privy Council in *Pertap Chunder Ghose* v. *Mohendranath Purkait* (2). At page 297 of the Report their Lordships say, 'Where one party induces the other to contract on the faith of representations made to him any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently.' Reference may also be made to *Foster* v. *Mackinnon* (3). That was a case where the defendant was induced to put his name on the back of the bill of exchange by the fraudulent representation of the acceptor that he was signing a guarantee. An action was then brought against him as endorser by a *bona fide* holder for value, and the Jury were directed by the Lord Chief Justice that if the defendant's signature to the document was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, he was entitled to the verdict. The Court held that this was a proper direction.

"So here, it seems to me that on a true understanding of the 1st defendant's case, it is open to him under the Evidence Act to attempt to prove that the alleged deed of sale was executed by him under a misrepresentation, so that it is not binding upon him.

"For these reasons I would reverse the decree and send back the case for findings upon these issues :—

"(1) Was there an understanding or agreement between the parties on the 27th October 1913 that the lands in suit should be mortgaged by the 1st defendant to the plaintiff ?

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1. (1899) I L R 22 All 149 : 26 I A 58.
2. (1889) I L R 17 Cal 291. 3. (1869) 4 C P 704.

"(2) Did the 1st defendant execute the sale-deeds under the false impression that they were deeds of mortgage?

"(3) If so, was that false impression induced by any act or representation of the plaintiff's?

"At the same time as we are remanding the case upon these points, and it is desirable that the whole litigation should proceed and be determined without interruption, I think it will be best to accede to Mr. Coyaji's contention that his client should be allowed to amend the plaint by adding an alternative claim on the footing that the deeds of the 27th October 1913 are held to be deeds of mortgage. That may, therefore, be done. Costs will be costs in the suit."

When the case came up for hearing before the new Subordinate Judge (K. R. Natu, Esq.), the parties offered no additional evidence, and on the 31st July, 1918, the Subordinate Judge delivered judgment as follows:—

"As no further evidence has been offered by the parties on the two issues, my position—I hereby say— is like that of an appellate Court which has to decide only on the evidence recorded in the lower Court. Mr. Mohile had the advantage of personally seeing the witnesses. I see no reason to differ from his conclusions. He has given full reasons for arriving at the findings given by him. For the same reasons I hold that the parties had agreed that suit lands should be mortgaged by defendant No. 1 to plaintiff under the deeds dated 27—10—1913. I also hold for similar reasons that defendant No. 1 executed these sale-deeds under the false impression that they were mortgage-deeds. The defendant No. 1 would not have passed the deeds unless the false impression was caused by some act or misrepresentation of the plaintiff. Hence my findings on the three issues sent down are in the affirmative. I don't believe for reasons given by Mr. Mohile that plaintiff had notice at the time he took his suit deeds from defendant 1 about the sale agreement between defendants 1 and 2. Hence as mortgagee plaintiff is entitled to priority against defendant 2's rights.

"As the plaintiff's deeds are thus held to be mortgage-deeds only and as no amendment of the plaint is made and as no additional Court-fees are paid, the amount due to plaintiff as mortgagee can't be determined and can't also be allowed in this suit. The plaintiff's suit is simply for possession as purchaser out and out. As he is not such a purchaser, the suit must fail.

"For the same reasons as those given by Mr. Mohile, I order parties to bear their own costs.

"ORDER:—The plaintiff's suit is dismissed.

"The parties should bear their own costs. I declare that plaintiff's suit deeds are mortgage-deeds."

Against this last-mentioned decree of the Subordinate Judge the plaintiff again appealed to the High Court, who (Macleod and Fawcett, JJ.) on the 16th June, 1920 delivered judgment in favour of the plaintiff, remarking as follows:—

"This case has already been before the High Court in First Appeal on 17th January, 1918. When the decree dismissing the plaintiff's suit was

P. C.

Lotu v. Hari Patil.

reversed, the case was sent back for findings upon certain issues framed by the appellate Court. It seems clear upon reading the judgment of that Court that it was of opinion that the 1st defendant could not possibly succeed unless he got findings in his favour in all three issues so framed. The first two issues were really, though differing in words, exactly of the same nature as the first two issues raised by the trial Court. Affirmative findings on these two issues will not enable the defendant to succeed. He must affirmatively prove fraud under *S. 92, Proviso 1, of the Evidence Act.*

"When the case came back before the learned Subordinate Judge no further evidence was called. The result was that the learned Subordinate Judge dealt with the case on exactly the same materials which were before Mr. Mohile at the first trial.

"Now at the first trial fraud was not one of the issues in the case. Fraud was not alleged. There was no evidence whatever to prove that the plaintiff had fraudulently induced the 1st defendant to execute these documents misrepresenting them to be mortgages when they were as a matter of fact sale-deeds. The 1st defendant had executed these documents. They are on the face of them sale-deeds, and unless he could make use of S. 92, proviso 1, he cannot be allowed to prove that they are documents of a different description to what they purport to be on the face of them. The evidence which satisfied Mr. Mohile that the documents should be looked upon as mortgages is not sufficient to enable the 1st defendant to succeed. What Mr. Mohile said was that although the oral evidence was entirely worthless to show that the transactions were to be given effect to as mortgages, still there were other circumstances which forced him to hold that defendant No. 1 wanted to treat them as mortgages. That is not sufficient to enable the 1st defendant to succeed. He may try to show that he wanted to treat them as mortgages, but he cannot, if he only does that, ask the Court to hold that these documents should be given effect to as mortgages. Therefore the 1st defendant has failed to prove what he was bound to prove, if he wished to succeed, against the plaintiff's claim as purchaser under the sale-deeds referred to in the plaint. It follows that the appeal must be allowed. The plaintiff must be put in possession. There should be an enquiry in the lower Court as to mesne profits. The plaintiff is entitled to his costs throughout."

Defendant No. 2 appealed to His Majesty in Council.

Raikes for appellant :—Both under the Deccan Agriculturists' Relief Act and otherwise, it lay on the second respondent to prove the sale to him, and he has not done it. If and so far as it lay upon the first respondent or the appellant to prove that the first respondent executed the deeds sued on in the belief that they were deeds of mortgage, and not of sale, they have in fact proved it. An affirmative finding on the third issue followed of necessity from the affirmative findings on the first two issues tried by Mr. Mohile. The High Court erred in thinking that the case in the Subordinate Judge's Court was not put under S. 10-A of the Deccan Agriculturists'

P. C

Lotu
v.
Hari Patil.

Act ; and even if the case had not been so put, the learned Judges should have dealt with the case under that enactment. On the evidence, the sale-deeds did not record the real agreement between the parties, and were not the acts of the first respondent if and so far as they were, they were induced by untrue representations of the second respondent. The decisions of each of the Subordinate Judges were right, but the first Subordinate Judge (Mr. Mohile) erred in rejecting the oral evidence, and should have accepted it.

Parikh for second respondent was not called on.

The first respondent was not represented.

13th May, 1924. The Judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN :—In this case the first respondent, the owner of certain separate parcels of land, entered into an agreement to sell those lands on 2nd October, 1913, to the appellant. He did not at the time follow that up by an actual sale, and on the 27th October, 1913, he sold the same lands to the second respondent by two sale deeds. Following upon that he also made a conveyance on the 6th November, 1913, in virtue of the first agreement. In the attestation which has to be appended at registration the vendor in respect of the sales of the 27th October, 1913, made a statement that he had signed the documents in question not as sales, but as mortgage deeds. Priority of time is in favour of the two sales which happened upon 27th October, and they, therefore, must be got rid of, and the way in which the defendant, whose transferee had got into possession, endeavoured to get rid of them was to asseverate that when he appended his signature to the two sale deeds on 27th October he was so drunk that he did not know what he was about. He went to proof upon that allegation, and that statement has been held to be untrue. It was also open to him to make the case that whereas he in fact signed sale deeds it had been represented by the other party that what he was really signing were mortgage deeds, in which case he would have been entitled to be relieved against this fraudulent act. At the trial as originally conducted he really gave no evidence as to any representation of that sort ; but entirely confined himself to this allegation about his state of utter drunkenness, and accordingly all the evidence that was left was that there was in fact an antecedent agreement to sell ; there was a certain conversation antecedent to the deeds of sale, in which he

P. C.

Lotu v. Hari Patil,

Lord Dunedin.

proposed to mortgage, and then there was what may be called a blank as to what happened at the actual transaction. Notwithstanding that, the learned Judge in the Court of first instance gave judgment in favour of there being no proper transaction of sale. The case then went on appeal to the High Court, and the High Court, feeling that the true matter had not been enquired into, sent it down again and put upon the defendant the necessity of showing that his signature to these two sale deeds had been obtained under a misrepresentation. He led no further evidence and the case was then heard by a second Judge, who repeated the judgment. The second Judge seems to have gone upon the view that inasmuch as the vendor had said in his attestation as to his signature that he had signed mortgage deeds and not sale deeds, that showed the impression that he was under, and it must be inferred that that impression had been induced by the action of the other party. The High Court reversed. It is impossible for their Lordships to draw such an inference as was drawn by the trial Judge, and their Lordships, therefore, think that it is quite clear that the case here is not made out, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for appellant : *E. Dalgado.*

Solicitors for respondents *T. L. Wilson and Co.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD BLANESBURGH, AND MR. AMEER ALI.

(On Appeal from the High Court of Judicature at Fort William, Bengal.)

Jagatput Singh Dugar *alias* Kalidas Dugar *Appellant* (Defendant)*

v.

Puran Chand Nahatta and another *Respondents (Plffs.).*

P. C.

Jagatpu Singh v. Puran Chand Nahatta.

*Compromise—Binding character—*Consensus ad idem*—Necessity —Interposition of third party to fix amount—Conclusive or leading element in contributing to compromise—Parties not* ad idem *as to—Effect—Legal Practitioner—Counsel—Compromise by—Power of—Compromise leaving amount to which client is entitled to be fixed by Counsel for other side—Express authority for—Necessity.*

A suit, which had been heard for two days, was, on the representation of Counsel on both sides that it was likely to be settled, passed over. Later in

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* P C Appeal No. 113 of 1923. 9th May, 1924.

P. C.

Jagatput Singh v. Puran Chand Nahatta.

the day counsel for the defendant stated that the case was settled and that the terms would be put in later. What happened was that counsel for both parties left the amount to which the plaintiff was entitled to be fixed by Mr. *C*, the leading counsel for the defendant. Mr. *C* mentioned a certain sum, but, on plaintiff being informed of it, he repudiated the suggestion that Mr. *C*'s opinion was final.

On an application by the defendant asking that the terms of settlement arrived at might be recorded and decree passed in accordance therewith, the question arose whether the parties to the compromise were truly *ad litem.*

Held, that though the impression upon the minds of counsel for both parties was that the settlement had been achieved, yet in point of fact there was a misapprehension as to the exact ambit of the terms of that agreement, that, as the defendant's counsel was under the impression that Mr. *C*'s interposition was merely to be accepted as a leading and predominant element in contributing to the compromise, while the plaintiffs' counsel thought that it was to be conclusive, the parties were not *ad idem* in connection with the compromise, and that the same had thus failed as a settlement of the suit between the parties.

Semble : Express authority on the part of counsel from his client is necessary to entitle counsel to commit the fortunes of his client to the determination of the counsel for the other side.

Appeal from a judgment and decree of the High Court (Appellate Jurisdiction) of the 22nd November, 1922, which reversed a judgment and decree of the said High Court (Original Jurisdiction), dated the 28th June, 1922.

The respondents instituted a suit on the 30th June, 1917 against the appellant in the High Court to recover Rs. 25,000, money alleged to have been paid by their father (Indra Chand Nahatta who had been excommunicated from the Jain community by his caste-people on account of his visit to Europe) to the appellant, the consideration for it (*viz.* re-admission into the community) having wholly failed, the appellant, by his written statement filed on the 29th August, 1917, pleaded *inter alia* that he had not received the money. Issues were framed, and the case was partly heard before the High Court (Original Civil Jurisdiction) on the 20th and 21st June, 1922 before Pearson, J. On the 22nd June, 1922, an application was made for an adjournment to enable the parties to settle. Negotiations took place between Counsel representing the parties (Mr. H. D. Bose for appellant, Mr. B. L. Mitter for respondents), whereby the appellant's Counsel alleged the whole suit was to be adjusted by the appellant paying the respondents

P. C.

Jagatput Singh v. Puran Chand Nahatta.

Rs. 5,000, whereas the respondents' Counsel denied there was any concluded agreement or compromise.

The "Minutes of Proceedings" were as follows :—

"PRESENT :—THE HON'BLE MR. JUSTICE PEARSON.

"22nd June, 1922.

"Puran Chand Nahatta and another *v.* Jagatput Singh Dugar.

"*Mr. B. L. Mitter* :—says the case may be settled and asks for adjournment.

"*Mr. H. D. Bose* :—Consents.

"*The Court* :—Pass it over.

"*Mr. B. L. Mitter* :—says case is settled and that the terms will be put in later.

"*The Court* :—Very well."

The appellant on the 26th June, 1922 filed the following petition praying the Court to record the alleged settlement in accordance with O. 23, R. 3 of the Civil Procedure Code :—

"To

"THE HON'BLE SIR LANCELOT SANDERSON, Kt., K. C., *Chief Justice*,

AND

"HIS COMPANIONS JUSTICES OF THE SAID COURT.

"THE HUMBLE PETITION OF THE DEFENDANT ABOVENAMED

"SHEWETH :

"1. That this suit came on for hearing before the Hon'ble Mr. Justice Pearson on the 20th of June, 1922 when it was heard for the whole day.

"2. That the hearing of the suit continued for the whole day on the 21st of June, 1922, and the defendant's senior counsel, Mr. A. N. Chaudhuri, was not present on that day after the mid-day adjournment.

"3. That at the close of the hearing on that date it was discussed by and between Mr. H. D. Bose, the senior counsel for the plaintiff, and Mr. B. L. Mitter for the defendant that this suit should be settled and both parties should abide by such terms of settlement as Mr. A. N. Chaudhuri should deem fit.

"4. That on the 22nd June, 1922, Mr. H. D. Bose and Mr. B. L. Mitter appeared before the Court, and on the case being called on, informed the Court that there was every chance of the case being settled and asked for an adjournment as will appear from the Minutes of the Court hereunder given.

"*Mr. B. L. Mitter*—says that this suit may be settled and asked for an adjournment.

"*Mr. H. D. Bose—consents.*

"*The Court*—Pass it over."

"5. That thereafter on the same day it was agreed by and between Mr. H. D. Bose and Mr. B. L. Mitter that this suit be settled on such terms as Mr. A. N. Chaudhuri would fix.

"6. That thereafter on the same day after the mid-day adjournment Mr. H. D. Bose and Mr. B. L. Mitter appeared and informed the Court that the case had been settled and the terms would be put in later as will appear from the Minutes of the Court hereunder given :

'*Mr. B. L. Mitter*—says that the case is settled and the terms will be put in later.

'*The Court*—Very well.'

"7. Mr. A. N. Chaudhuri decided that there should be a decree in favour of the plaintiff for Rs. 5,000 with costs on Scale No. II, and on the morning of the 23rd June instant at about 10-45 A. M. he informed Mr. H. D. Bose and Mr. B. L. Mitter what his decision was.

"8. That I am informed by my solicitors that on the terms being communicated by Mr. H. D. Bose through the plaintiffs' solicitor Mr. A. C. Bose to the plaintiffs' representative they resiled from the agreement arrived at and refused to have a decree as aforesaid.

"9. That under the circumstances your petitioner is advised and he submits that there was a valid and binding adjustment of this case and your petitioner is entitled to have such settlement recorded.

"Your petitioner therefore humbly prays your Lordship for an order that the above settlement may be recorded and a decree made in terms thereof.

"And your petitioner, as in duty bound, shall every pray

"DUTT AND SEN,

"*Defendant's Attorneys.*

"I, Jagatput Singh Dugar, the petitioner above-named, do declare that the matters and facts stated in paragraphs 1 to 9 in the foregoing petition are true to my knowledge.

JAGATPUT SINGH.

"Solemnly affirmed by the said Jagatput Singh Dugar at the Court-House in Calcutta this 26th day of June, 1922, before me.

"J. MITRA,

Commissioner."

This was opposed by the respondents, who, on the 27th June, 1922, filed an affidavit in reply as follows :—

"I, Puran Chand Samsukha, the manager of the plaintiffs abovenamed, residing at No. 47, Khongraputty Street in the town of Calcutta, solemnly affirm and say as follows :—

"1. That I have read and understood the petition of the defendant filed herein. I was attending Court during the hearing of the suit and also instructing my legal advisers in connection therewith.

"2. That whatever discussions there were between the counsel about negotiations for a settlement the same were strictly without prejudice and Mr. H. D. Bose was never instructed to consent to any figure whatsoever named by Mr. A. N. Chaudhuri. I would not have entered into any discussions which were had without prejudice, but I am compelled to do so by the dishonourable

P. C.

Jagatput Singh *v.* Puran Chand Nahatta.

conduct of the applicant in referring to them. The negotiations were started by Mr. B. L. Mitter telling Mr. H. D. Bose that he, Mr Mitter, did not believe in a single word of his client's case and he would like to have the matter settled. Mr. H. D. Bose to avoid a protracted and costly trial suggested that half the claim may be decreed.

"3. I do not admit the allegation contained in paragraph 5 of the petition and I state as the fact is that I always understood that no figure could be settled between the parties without the approval of Mr. H. D. Bose.

"4. It is not true as a fact that the case was settled between the parties, and I have been further advised that in the circumstances of the case there could not be a valid settlement capable of being recorded in Court. I have also been advised that there is neither a valid submission nor a valid award or adjustment and the application which is directed to gain time should be dismissed with costs.

"PURAN CHAND SAMSUKHA.

"Solemnly affirmed by Puran Chand Samsukha at the High Court, Calcutta, this 27th day of June, 1922 before me.

"J. MITRA,
Commissioner."

On the 28th June, 1922, the application came on for hearing, and the following Minutes of Proceedings were recorded :—

"*Sir B. C. Mitter* for the defendant :—applies to have a settlement recorded,

"*Messrs Sarkar* and *H. D. Bose* for plaintiff—oppose the application.

"*Mr. Bose* :—files affidavit and mentions that he will *not rely on paragraph 2 of his affidavit* and says that was drafted under misapprehension as no such conversation took place.

"*Mr. Bose* :—says there is no dispute as to facts but the question is whether there has been a settlement having regard to O. 23, R. 3. The question of amount was left to Mr. Chaudhuri ; we did not say that we would abide by what Mr. Chaudhuri would decide. Mr. Chaudhuri was not appointed an arbitrator and could not be. There was an attempt to settle the suit.

"*Mr. Bose* :—says he is not relying on his affidavit. Mr. Chaudhuri had a predominant voice in the settlement. There were mere negotiations for settlement. Mr. Chaudhuri mentioned certain amount to which my client could not agree. Mr. Chaudhuri said the plaintiff ought to be satisfied with the amount he mentioned. That was not a decision by him. That was merely a negotiation, Mr. Chaudhuri having predominating voice.

"*Sir B. C. Mitter*—admits that Mr. Chaudhuri was not an arbitrator.

"*Mr. Bose* :—says the circumstances must be considered. Mr. Chaudhuri was in the case and, without suggesting anything

P.C.

Jagatput Singh v. Puran Cnand Nahatta.

against him, (his) position could not be that of an umpire. Any figure which he approved or suggested was by way of negotiation.

"*Sir B. C. Mitter* :—says Mr. Bose does not deny facts of my affidavit and says the question of amount was left to Mr. Chaudhuri as Mr. Bose admits.

"*The Court* :—delivers judgment."

Pearson, J. then delivered Judgment (as under) decreeing that the appellant should pay the respondents Rs. 5,000 and costs of the suit to be taxed under Scale II (ordinary causes), and that the respondents should pay the appellant his costs (to be taxed) of and incidental to the said application :—

"This is an application asking that the terms of settlement arrived at in the suit may be recorded and decree passed in accordance with them. The facts are stated in the petition of the defendant Jagatput Singh and those facts are not disputed. On the other hand, the statements made in paragraph 2 of the affidavit in opposition are not relied upon, as it is stated by the Counsel for the plaintiff that they were made under a misapprehension. The evidence in the suit was taken for two days, and at the close of the 2nd day it was suggested that the case might be settled. On the following day, after a short adjournment to enable a settlement to be arrived at, it was represented to me that the case had been settled between the parties and that the only question outstanding was as regards the amount to be paid and that as regards that the parties had left it in the hands of one of the Counsel for the defendant, Mr. A. N. Chaudhuri. Mr. Chaudhuri accordingly fixed the sum of Rs. 5,000 as the amount to be paid with costs on Scale No. 2.

"It is said the plaintiff did not accept this amount and it is now contended that he is not bound by the settlement. He says if it was an arbitration, no appropriate proceedings were taken ; and if it was not an arbitration, the matter never went beyond the stage of negotiation, in which Mr. A. N. Chaudhuri might be regarded as having a predominating voice ; in neither case is he bound. On the other hand, the defendant contends that the case was settled and all that happened was that both parties agreed to abide by the sum to be mentioned by Mr. Chaudhuri, and he having mentioned the figure the suit was settled. There was no question of arbitration, as no procedure for arbitration was adopted or intended to be adopted, and no witnesses were heard. Mr. Chaudhuri was Counsel in the case, and both parties left to him as to what figure should be paid. In these circumstances I am of opinion that the contention of the defendant is correct, that a settlement was completed upon the naming of the figure by Mr. Chaudhuri, and that the plaintiff is bound by the settlement. There will therefore be an order in terms of the prayer of the petition and the suit decreed for Rs. 5,000 in terms of the settlement. The defendants will get their costs of this application."

The respondents, on the 16th August, 1922, appealed, contending *inter alia* that—

"Inasmuch as the appellants had never agreed to accept any figure to be mentioned by Mr. A. N. Chaudhuri and inasmuch as Mr. H. D. Bose had specific

P. C.

Jagatput Singh v. Puran Chand Nahatta.

instructions not to accept any figure less than half the claim in the suit, the alleged compromise was not binding on the appellants, and the said Court has erred in not holding the same.

"The authority of Mr. A. N. Chaudhuri, whatever it was, could be and was withdrawn before any application was made for recording the terms."

On the 22nd November, 1922, the High Court in its appellate jurisdiction (Sanderson, C. J. and Richardson, J.) allowed the appeal, and set aside the Judgment of Pearson, J., remarking :—

"On the face of these minutes I cannot understand how it can be said that there was a concluded agreement that the parties would abide by the decision of the learned Counsel Mr. Chaudhuri. It is to be remembered that the arrangement, whatever it was, was made by two learned Counsel, Mr. H. D. Bose on the one hand, and Mr. B. L. Mitter on the other ; and if Mr. H. D. Bose had in fact agreed that his client would abide by what Mr. Chaudhuri should decide, I cannot understand how he could come into Court on the 28th June and state that what had happened was mere negotiation. It appears that he stated that "any figure which Mr. Chaudhuri approved or suggested was by way of negotiation." I cannot help thinking that there must have been some misunderstanding. Mr. H. D. Bose and Mr. B. L. Mitter both occupy a high position at the Bar and are respected by all who know them. It seems to me impossible that Mr. Bose could have stated that what took place was mere negotiation, if he had made or had intended to make a definite and concluded agreement that his client would abide by Mr. Chaudhuri's decision.

"My conclusion is confirmed by the improbabilities of the alleged arrangement. The plaintiff, represented by Mr. Bose, was claiming no less than a sum of Rs. 25,000 from the defendant ; the case had been heard for two days: Mr. Chaudhuri had taken an active part in the conduct of the defendant's case and had in fact cross-examined a witness ; and, yet, the respondent would have us believe that Mr. Bose, without the express consent of his client, submitted the whole of the plaintiffs' claim to the decision of the learned Counsel who was acting for the defendant. If he had done so, I do not see how Mr. Bose could have used these words, "There were mere negotiations for settlement. Mr. Chaudhuri mentioned certain amount to which my client could not agree," and "any figure which he approved or suggested was by way of negotiation." I cannot help thinking that what Mr. Bose had in his mind was that as Mr. A. N. Chaudhuri was the leading Counsel for the defendant it was only natural that he should be consulted before the final figure was arrived at, but that it still remained open to his own client to express an opinion as to whether he would accept it or not.

"In view of that conclusion it seems to me that it would be wrong to allow this alleged agreement to be recorded under O. 23, R. 3. To put it at the lowest, it is clear to me that there is an uncertainty as to what happened between the two learned Counsel and, if that be so, this is not an arrangement, which in my judgment, ought to be recorded under O. 23, R. 3.

"In my judgment, therefore, this appeal ought to be allowed and the decision of the learned Judge that the alleged settlement should be recorded and the suit decreed for Rs. 5,000 must be set aside.

"The conclusion at which I have arrived renders it unnecessary for me to express any opinion upon the other point which was argued in this case, namely, that if there was a concluded agreement, it was an agreement to refer the matter to the arbitration of Mr. Chaudhuri : and if that be so, it was not a compromise or an agreement which could be recorded under O. 23, R. 3, having regard to the fact that the provisions relating to arbitration contained in the Second Schedule of the Civil Procedure Code had not been complied with. The learned Counsel put forward this argument relying upon Mr. Justice Rankin's judgment in *Amarchand Chamaria* v. *Banwari Lal Rakshit* (1). It is not necessary for me to express any opinion upon that point ; nor is it necessary to express any opinion on the last point, namely, whether the learned Counsel Mr. Bose who had implied authority to refer the matter to a learned Counsel, who was appearing on the opposite side. I agree with what Sir Benode Mitter said, viz., that this point does not appear to have been taken before the learned Judge, and it might be necessary to have some evidence upon the point, if it were essential that we should express any opinion upon it.

"I take this opportunity of repeating once more that learned Counsel will be well advised, when they are settling a case on behalf of their clients, to put the terms of settlement into writing and get those terms of settlement signed by their respective clients. If that be done, disputes of such a nature as that which we have had to-day will be avoided."

The appellant thereupon appealed to His Majesty in Council.

Dunne, K. C. and *Macaskie* for appellant.

De Gruyther, K. C. and *Kyffin* for respondents.

9th May, 1924. The Judgment of the Board was delivered by

LORD SHAW :—There are two interesting questions raised on this appeal. They will be taken in their logical order. Lord Shaw.

The first has reference to the point of the authority of counsel to conclude this transaction of compromise of a pending suit. It must be admitted that the compromise was of a somewhat singular character. One circumstance reflects the greatest credit upon the senior counsel for the defendant in the case, because by that compromise he was elected by both parties as the person whose verdict would be taken either as final judgment, or, at least, for consideration, on the subject of the amount to be paid to the plaintiff in the action.

Their Lordships are aware that the authority of counsel to compromise actions upon a general footing is not in question, under what is known as "the mandate of wig and gown."

1. (1921) I L R 49 Cal 608.

P. C.

Jagatput Singh v. Puran Chand Nahatta.

Lord Shaw.

But their Lordships are of opinion that the compromise disclosed in these proceedings was of a highly exceptional, if not unique, character. And they incline to the view that it would have demanded the express authority on the part of counsel from his client to go the length that counsel here went. In point of fact, what happened was that the client upon one side had his fortunes committed by his counsel to the determination of the counsel for the other side, and, as stated, without any express authority, to make a bargain of that character. Their Lordships, however, do not finally decide this point, although they have the doubts which have just been expressed.

For, in the circumstances brought before them, their Lordships are confronted with the broad proposition made by the learned Chief Justice as to the question of whether the parties to the compromise were truly *ad idem*. This is the second question in the appeal.

The details need not be gone into, but unquestionably there are, on the records of the Court made by the officials, entries which show that the case was taken out of the list during the trial on the assertion made to the Court that the case was settled. Their Lordships are of opinion that both Mr. Mitter, the counsel who made the statement to that effect, and Mr. Bose, his opponent, were of opinion that it was settled. The question of terms was, however, raised ; and their Lordships are equally clearly of opinion that, although the impression upon the minds of both counsel was that the settlement had thus been achieved, yet in point of fact there was a misapprehension as to the exact ambit of the terms of that arrangement. It turned out that when Mr. Chaudhuri's figure of Rs. 5,000 as a compromise of a claim for Rs. 25,000 was announced, Mr. Bose's client repudiated any such proposal and declined to agree to it. Upon Mr. Bose being appealed to as to what had occurred, he admitted quite frankly that an arrangement was come to, but he was quite as frank and quite as emphatic that the arrangement was not to be conclusive, but that Mr. Chaudhuri's interposition was merely to be accepted as a leading and predominant element in contributing to the compromise of the action between the parties.

In those circumstances this case is brought, and it was supported by an affidavit produced by Mr. Bose's client. Their Lordships are of opinion that Mr. Bose's conduct in regard to

P. C.
Jagatput Singh v. Puran Chand Nabatta.
Lord Shaw.

that affidavit was praiseworthy and worthy of the position of a leading counsel. He practically tore the affidavit up ; he would have nothing to do with placing reliance upon it. He has not thereby in any way weakened the force of the rest of his own testimony ; on the contrary, he has strengthened it. Their Lordships have with anxiety considered the position which he takes up, which was that he was not of opinion that a final and binding agreement which should commit his client to any sum or no sum, as fixed by Mr. Chaudhuri, had been come to. They are of opinion that the parties were not *ad idem* in connection with this compromise, and that the compromise has thus failed as a settlement of the suit between the parties. The suit must proceed if the parties are so inclined, so that their rights may be judicially determined. But the judgment of the learned Chief Justice appears adequately to express the opinion in a difficult case which their Lordships have also reached ; and they will humbly advise His Majesty that the appeal should be disallowed, with costs.

Solicitors for appellant *J. J. Edwards and Co.*

Solicitors for respondents *Downing, Middleton* and *Lewis.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

(On Appeal from the High Court of Judicature at Calcutta.)

Banku Behari Dhur *Defendant**

v.

J. C. Galstaun and another *Plaintiffs.*

P. C.
Behari Dhur v. Galstaun.

Vendor and purchaser—Agreement for purchase of mortgaged property—Breach of—Marketable title—Vendor's duty to make out—Breach of—Agreement—Construction—Penalty—Provision in agreement by way of—Contract Act, S. 74.

G sued upon a mortgage executed in his favour by *P*, making *B*, a trustee appointed by *P* for the liquidation of his debts, *P's* widow, and a number of puisne mortgagees parties to the suit. The suit was compromised, and the agreement of compromise was incorporated in a decree. The material clauses of the agreement ran as follows :—

*P C Appeal No. 52 of 1921. 10th April, 1923.

P. C.
Behari Dhur v. Galstaun.

(e) That G will, at the request and by the direction of B, pay off the moneys due to other mortgagees not exceeding Rs. 60,000 and the amount paid will be added to this mortgage claim and carry interest at 7 per cent. per annum with quarterly rests in account and the said G will not, under any circumstances whatsoever, be able to call for or take any steps for realization thereof until the expiration of four years from the date hereof.

(g) That the title should be accepted by G upon the said B making out a marketable title thereto and that the purchase should be completed within one month from the date hereof. If such purchase be not completed within the aforesaid period, then the interest on the part of the principal moneys secured by the said mortgage and further charges, namely, 2 lakhs and odd rupees, should cease to run and G shall be deemed to be the owner of the above premises subject to the charge and mortgage mentioned in cl. (2) as well as all existing encumbrances on the property herein and the whole of the said consideration money of 2 lakhs and odd rupees should *ipso facto* be set off against his claim under his mortgage and further charges.

The date of the agreement was 28—4—1918, but the conveyance was tendered by G only on 31—5—1918, *i. e.*, three days after the period of one month fixed by the agreement for the completion of the purchase. B refused to accept the conveyance on the ground that G was, under the terms of the agreement, bound to complete the purchase within one month from its date and had failed to carry it out ; his contention being that G must consequently bear himself the burden of all outstanding encumbrances, and was not entitled to add them to his own security, which was to form the consideration for the re-conveyance. As a matter of fact, the delay in the completion of the purchase was due principally to the default of B, because he did not, amongst other things, make out a marketable title.

Held that there was a duty imposed on B in relation to the conveyance he had to execute in favour of G, that he was bound to make out a marketable title in respect of the property, that he, not having any steps to do so, was not in a position to ask for the enforcement of the provision in cl. (g) of the agreement, and that even if he had not been in default, and the provision in cl. (9) might be regarded as one in the nature of a penalty, he, not having made out any loss, was not entitled to refuse the conveyance tendered.

Appeal from an order (11th December, 1918) of the High Court of Judicature at Fort William in Bengal (Appellate Jurisdiction) varying an order of the same High Court (26th July, 1918) made in its Ordinary Original Civil Jurisdiction.

De Gruyther, K. C., Ramsay and *Kalimwallah* for appellant.

George Lowndes, K. C. and *Dube* for respondents.

10th April, 1922. The Judgment of their Lordships was delivered by

Mr. Ameer Ali.

MR. AMEER ALI :—This is an appeal from an order of the High Court of Calcutta, dated the 11th December, 1918,

which, with a variation as to costs, affirmed an order made by Mr. Justice Greaves in the exercise of the Ordinary Original Civil Jurisdiction of the Court, on the 26th July, 1918, in a matter which came before him upon an application arising out of a case to which reference will be made presently.

It appears that a Hindu inhabitant of Calcutta, named Nanda Lal Mullick, who died on the 22nd February, 1891, owned considerable house property in that city. He left surviving him a widow and an adopted son, Prem Lal Mullick. The estate of Nanda Lal Mullick appears to have been, at the time of his death, burdened with debts, which increased in the hands of Prem Lal Mullick. In order to save the property from sale in execution of decrees, Prem Lal, with the consent of the Administrator-General, executed, on the 2nd October, 1895, a document by which he conveyed his entire estate inherited by him from Nanda Lal Mullick to the present appellant, Banku Behari Dhur, as trustee for the liquidation of his debts. Prem Lal died intestate on the 20th March, 1907, leaving a widow, Srimati Radharani Dasi.

In order to liquidate the debts of the deceased Prem Lal Mullick, and other liabilities on the estate, Banku Behari Dhur had, in conjunction with Prem Lal, who was then alive, obtained considerable sums of money from the respondent, Galstaun, on three mortgages in respect of several properties owned by Prem Lal Mullick, among them being 21, Strand Road, to which the present dispute relates. On the 26th June, 1915, Galstaun brought a suit in the High Court of Calcutta upon the several mortgages held by him for the usual mortgage decree.

Beside Banku Behari Dhur, the trustee aforesaid, Srimati Radharani Dasi, the widow of Prem Lal, as the heiress of her husband, was made a party along with a number of puisne mortgagees. One of these puisne mortgagees was a lady named Madhab Mohini Dasi.

This suit was compromised, and the agreement of compromise was incorporated in the decree which was made by Mr. Justice Greaves in the High Court in its Ordinary Original Civil Jurisdiction, on the 1st May, 1918. The terms of the agreement material to this judgment are as follows :—

"(e) That Mr. Galstaun will, at the request and by the direction of Babu Banku Behari Dhur, pay off the moneys due to other mortgagees not exceeding Rs. 60,000 and the amount paid will be added to this mortgage claim and carry interest at 7 per cent. per annum with quarterly rests in account and

P. C.
Behari Dhur
v.
Galstaun.
Mr. Ameer Ali.

the said Mr. Galstaun will not, under any circumstances whatsoever, be able to call for or take any steps for realisation thereof until the expiration of four years from the date hereof.

"(g) That the title should be accepted by Mr. Galstaun upon the said Babu Banku Behari Dhur making out a marketable title thereto and that the purchase should be completed within one month from the date hereof. If such purchase be not completed within the aforesaid period, then the interest on the part of the principal moneys secured by the said mortgage and further charges, namely, Rs 2,90,000 should cease to run and Mr. Galstaun shall be deemed to be the owner of the above premises subject to the charge and mortgage mentioned in cl. (a) as well as all existing encumbrances on the property herein and the whole of the said consideration money of Rs. 2,90,000 should *ipso facto* be set off against his claims under his mortgage and further charges."

Madhab Mohini Dasi, the puisne mortgagee referred to above, appears to have made some delay in furnishing an account of her claim, and when the money was tendered to her by the plaintiff, on behalf of Banku Behari Dhur, in the terms of the decree, she refused to accept it, making the delay the reason of her refusal. The matter had to go before the Court, and the learned Judge had to make a peremptory order directing that what was due to her should be paid within one week from the date of his order in certain shape set out therein, and that, on her failure to accept the payment, the money due should be paid into Court to the credit of the suit, and the Registrar should thereupon approve of the re-conveyance on her behalf. Thereafter Mr. Galstaun tendered to Banku Behari Dhur, the appellant, the conveyance in respect of 21, Strand Road, in the terms of the agreement embodied in the decree in the mortgage suit. The date of the agreement was the 28th April, 1918, and it was provided under the agreement that the purchase by Mr. Galstaun should be completed "within one month from the date hereof." The conveyance was apparently tendered by Mr. Galstaun three days later, *viz.*, on the 31st May, 1918. It was in the usual form, but Banku Behari Dhur refused to accept it on the ground that Mr. Galstaun was, under the terms of the agreement, bound to complete the purchase within one month from its date and had failed to carry it out; his contention being that Galstaun must consequently bear himself the burden of all outstanding incumbrances, and was not entitled to add them to his own security, which was to form the consideration for the conveyance.

On the objection of Banku Behari Dhur to accept the conveyance as tendered by Mr. Galstaun, the matter had to go

again before Mr. Justice Greaves, and he came to the conclusion that the delay in the completion of the purchase was due principally to the default of the appellant himself ; that, as a matter of fact, he did not deliver copies of the mortgages to the respondent, and did not make out a marketable title ; that is, that he did not send to the mortgagee (Galstaun) copies of the mortgages upon the properties other than the mortgages in his favour, which were with him ; that he did not send or cause to be sent within one month from the date of the settlement, account of the dues to the several subsequent mortgagees; and that he did not arrange for proper re-conveyance being executed and registered by the mortgagees on receipt of their actual claims. It also appears that he did not take proper steps to expedite the re-conveyance from Madhab Mohini Dasi. The learned Judge accordingly considered that the respondent was not in default in respect of the delay in tendering the conveyance under the terms of the settlement as embodied in the decree, and he accordingly overruled the objection of Banku Behari Dhur, and directed that he and Radharani Dasi were to execute it in the form tendered by Galstaun, omitting all reference to cl. (*g*), within a week from the date of his order. Banku Behari Dhur preferred an appeal to the High Court from the order of the learned Judge sitting on the Original Side of the Court, and the learned Chief Justice and Mr. Justice Woodroffe, who heard the appeal, came to the conclusion that Galstaun was actually in default ; but they were also of opinion that the provision in cl. (*g*) relating to his default was by way of penalty, and that as, under S. 74 of the Contract Act, it was not established that he had suffered any loss from the delay in the actual tender, Banku Behari was not entitled to any relief on account of Galstaun's default. They accordingly affirmed the order of Mr. Justice Greaves in so far as the execution of the conveyance was concerned, but varied his order relating to costs, and made Galstaun liable for all the costs incurred in the course of the proceedings. Banku Behari Dhur has now appealed to His Majesty in Council, and his contention is that as Galstaun has been found to be in default, he must be held subject to the condition embodied in cl. (*g*) of the terms of settlement and ought to bear himself the burden of whatever charges or encumbrances may be outstanding in respect of the property in question, *viz.*, 21, Strand Road.

P. C.
Behari Dhur
v.
Galstaun.
Mr. Ameer Ali.

Their Lordships, after having fully heard counsel in support of Banku Behari's contention, are of opinion that the position taken up by him is wholly untenable. They agree with Mr. Justice Greaves that there was a duty imposed on him in relation to the conveyance he had to execute in favour of Galstaun ; that he was bound to make out a marketable title in respect of the property, and, as the learned Judge points out, he did not take any steps to do so ; and that consequently he is not in a position to ask for the enforcement of the provision on which he takes his stand in cl. (*g*). Further, their Lordships think that even if he had not been in default, and the provision in cl. (*g*) might be regarded as one in the nature of a penalty, he has not made out any loss—as the Appellate Court find—and is, therefore, not entitled to refuse the conveyance tendered.

Their Lordships are, therefore, of opinion that this appeal should be dismissed with costs, and that the order of the High Court on appeal should be varied by striking out the order as to costs, and that in respect of costs the order of the first Judge should be restored. And their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellant : *Watkins* and *Hunter*.

Solicitors for the respondents: *Barrow, Rogers* and *Nevill.*

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Esufali Mahammedbhoy Allibhoy and others *Appellants** (*Plaintiffs*)

v.

A. K. Thaha Ummal and others *Respondents* (*Defendants* 2 *to* 6).

Esufali Mahammed-bhoy Allibhoy
v.
Thaha Ummal.

Bill of Lading—Exemption clause—Perils of the sea—Burden of proof—Negligence—What amounts to—Damage by sea water—Liability for.

When a Bill of Lading contains the usual exemption clause as regards the liability for acts of God, King's enemies and the perils of the sea, in a suit by the consignee for damages for loss of goods, etc., the defendant ship-owner must

*Appeal No. 63 of 1921. 24th January, 1924.

plead and prove "perils of the sea" if that is his defence. If he makes out a *prima facie* case, plaintiff can rebut it by proving negligence on the part of the defendant.

Esufali Mahammed-bhoy Allibhoy v. Thaha Ummal.

In deciding what amounts to negligence, the mere fact that the accident might have been avoided by greater foresight does not make it negligence. If reasonable care is taken, the perils of the sea while not including the effects of mere ordinary wear and tear will include the consequences of any kind of accident ending in damage by sea water.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in O. S. No. 6 of 1918.

T. R. Venkatrama Sastri and *K. S. Sankara Aiyar* for appellants.

S. Srinivasa Iyengar and *K. V. Sesha Iyengar* for respondents.

K. R. Rangaswami Iyengar for 1st and 4th respondents.

The Judgment of the Court was delivered by

RAMESAM, J. :—This is a suit for damages to plaintiffs' goods consigned on defendants' schooner, *Sahul Hameed*. The schooner left Colombo on 25th August, 1917 and arrived at Tuticorin on 28th August with 250 cases of safety matches entrusted by plaintiff to the Master. The goods were landed on the 30th in a damaged condition. On a certificate of survey (Ex. C) by the Secretary of the Local Chamber of Commerce, the goods were sold by auction on 30—10—17 (Ex. G) and realized Rs. 3,142 (Ex. D). The market value is alleged to be Rs. 31,750. The suit is for the difference. Ramesam, J.

Ex. II is the bill of lading issued by the defendant's agent. It contains the usual exemption clause—" The act of God, King's enemies, fire and all and every other dangers, accidents of the seas, rivers and navigation of whatever nature or kind soever excepted." Though there has been considerable argument on the question of burden of proof and several cases have been cited before us, the matter seems to be clearly settled in the present state of authorities. It is for the defendant to plead and prove 'perils of the sea.' If he makes out a *prima facie* case, the plaintiff can rebut it by proving defendant's negligence (*see* the Judgment of the Court of Appeal in the Glendanoch, 1894, p. 226). Esher, M. R., at p. 232, explains certain expressions of Lord Herschell in *The Xantho* (1). *See* also *The Norway* (2), Scrutton on Charter Parties (10th

1. 12 A C 508. 2. 3 Moo P C N S 245 : 16 E R 92.

Esufali Mahammedbhoy Allibhoy v. Thaba Ummal. — Ramesam, J.

Edition), Art. 79, Note 1 and Art. 83, Note at page 298, Carver on Carriage by Sea, S. 87.

We have therefore to see what the facts alleged and proved are. The defendants claim that the damage to the goods was on account of peril of sea, *i. e.*, that there was a strong wind on the night of the 29th and the ship was driven away from the place where she anchored at first towards the south. The wind then changed its direction with the result that the schooner swung round and sat on her anchor causing a hole on her part side. The vessel stranded and at 6 A. M. there was 5 feet of water in the hold. The cases of safety-matches were damaged by the sea water. The plaintiff denies any change in the position of the ship and alleges negligence on the part of the Master in anchoring in shallow water.

The learned Judge then discusses the evidence in the case.

The next question is whether the facts so proved amount to a peril of the sea. If the vessel had anchored from the beginning in 7 feet of water one may say it was sheer carelessness but on the facts proved it cannot be described as negligence. It may be that if the vessel had anchored in deeper water, further off towards the east, it would not have stranded even if it drifted towards the south on account of the wind. The mere fact that the accident might have been avoided by greater foresight does not make it negligence. The difference between ordinary perils and extraordinary perils suggested in Story on Bailments (S. 512) has not been accepted by the authorities (Carver, S. 87). The loss need not be extraordinary in the sense that the cause must be uncommon. It is true that negligence does not save the defendants' liability [Willis, J., in *Grildv.General Iron Screw Collier Co.* (3)].But if reasonable care is taken, the perils of the sea while not including the effects of mere ordinary wear and tear, will include the consequences of any kind of accident ending in damage by sea water [Abbot on Merchant Shipping, p. 612, citing *Fletcher* v. *Inglis* (4), Scrutton, Art. 83, *Corcoran-Gurney* (5), *Laurie* v. *Douglas* (6), *The Thrunscoe* (7), *The Catharine Chalmers* (8), *Bishop* v. *Pentland* (9), where a rope broke, *Merchants Trading Co.* v. *Universal Marine Co.* (10)].

3. L R 1 C P 612.

4. 2 B & Ald 315.

5. 1 E & B 456.

6. 15 M & W 746.

7. (1897) P 301 at p. 304.

8. 32 L T 847.

9. 7 B & C 219.

10. Lus L J 9 Q B 581 at p. 596.

In *Amies* v. *Stevens* (11) a sudden gust of wind was held to make all the difference. On the question of what is a proximate cause, the latest decision in *Loyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (12), especially the judgment of Lord Shaw of Dunfermline may be referred.

The appellants pointed out that while the other schooner had 3 or 4 anchors (P. W. 3), it does not appear that the suit schooner had more than one. I do not think this matters. She had 15 fathoms of cable (Ex. N). The crew had put out more chain to prevent the dragging but without success (Ex. X). Some of the cases relied on by the learned vakil for the appellants [*Davis* v. *Garrett* (13) and *James Morrison and Co.* v. *Shaw Savil and Albion Co., Ltd.* (14)] are cases of deviation. In *Joseph Travers and Sons, Limited* v. *Cooper* (15) clear negligence in leaving the barge unattended at night was proved and then it was for the defendant to show that the loss was not caused by the negligence. Negligence was also proved in *Price and Co.* v. *Union Lighterage Co.* (16) and in *In re Polemisand Furness, Withy and Co.* (17). *Steiurnan and Co.* v. *Angier Line* (18) was a case of theft by the men in the ship's service. The cases of *City of Peking* (19) and *The President Lincoln* (20) are cases of collusion and negligence where negligence was held to be the initial cause. In *Leonards Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* (21) the vessel was unseaworthy and the owners did not discharge the onus that lay on them.

We think the defendants have not been guilty of negligence and have proved a peril of the sea. In view of this finding we have not heard arguments on the question of damages.

The appeal must be dismissed with costs.

T. S. V. *Appeal dismissed.*

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11. 1 Strange 127.
12. (1918) A C 350.
13. 6 Bing 716.
14. (1916) 2 K B 783.
15. (1915) 1 K B 73.
16. (1903) 1 K B 750. [On appeal (1904) 1 K B 413].
17. (1921) 3 K B 560.
18. (1891) 1 Q B 619.
19. 14 A C 40.
20. (1911) P 248.
21. (1915) A C 785.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Kalyani Pillai and others *Appellants** (*Defendants-Respondents Nos.* 7, 28, 29, 35, 51, 53, 62, 64, 67, 74, 81, 86, 97, 103, 106, 107, 108, 110, 111, 113, 115, 116, 117, 118, 119, 120, 122, 124, 127, 129 *and* 133)

v.

Thiruvenkatasami Iyengar and another *Respondents* (*Plaintiffs* 7 *and* 9).

Kalyani Pillai *v.* Thiruvenkatasami Iyengar.

Privy Council—Appeal—Death of parties—Representatives not impleaded—Effect of decree—Addition of such representatives—Limitation—Limitation Act, Art. 181.

Notwithstanding the death of some of the respondents in an appeal to the Privy Council and the omission to bring on record their legal representatives, the decree of the Privy Council would be binding on the deceased respondents as if they were parties thereto. An application to bring on record their legal representatives for purposes of execution in the lower Court is governed by Art. 181 of the Limitation Act and the time runs from the date of the decree of the Privy Council.

Appeal against the order, dated 10th November, 1922, of the Court of the Subordinate Judge of Tanjore in E. P. No. 279 of 1905 in O. S. No. 4 of 1884 (Sub-Court, Kumbakonam).

T R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for appellants.

V N. Venkatavaradachari for respondents.

The Judgment of the Court was delivered by

Phillips, J.

PHILLIPS, J. :—Objection is taken by appellants to the execution of a decree of the Privy Council. It is first contended that, as three of the respondents were dead when the appeal was heard and judgment was pronounced, the decree against them is a nullity. S. 23 of William IV, Ch. 41, however, cures the defect in the judgment for it enacts that the order shall have full force and effect notwithstanding the death of any of the parties interested therein. Vide *Deonandan Prasad Singh* v. *Janki Singh* (1). The deceased respondents

*A A O No. 61 of 1923. 12th February, 1924.

1. (1920) 5 P L J 314.

must therefore be considered as parties to the decree notwithstanding their death before it was passed.

Kalyani Pillai v Thiruvenkatasami Iyengar.

Phillips, J.

It is next urged that the application to bring on record their legal representatives is barred by limitation, being made more than three years after their death ; but Art. 181 of the Limitation Act gives three years from the date when the right to apply accrued. The right to implead parties to a decree cannot arise until the decree is passed. This objection must therefore fail.

The further argument that the Privy Council failed to consider another objection to the execution petition on the score of limitation ignores the fact that the Privy Council decree orders execution to proceed and the executing Court cannot go behind the decree.

The appeal is accordingly dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Palani *alias* Thirumeni Thevan (minor) by next friend Pechi Ammal *Appellant** (*Plaintiff*)

v.

Sethu and others *Respondents* (*Defendants* 1 *to* 4).

Palani v. Sethu.

Evidence Act, S. 112—Legitimacy—Presumption—Conception during continuance of prior marriage—Birth after re-marriage.

Where at the time of conception of a child its mother had been lawfully married to *A.* and subsequently on divorce, she married *B.* and the child was born within three months of the re-marriage, *held* that the child must be treated as the legitimate offspring of *B*, in the absence of proof that *B.* had no access to the mother at the time when the child would have been begotten.

S. 112 of the Evidence Act refers to the point of time of the birth of a child and not to the time of its conception as the deciding factor in a case of disputed legitimacy. *Nicholas* v. *Asphar,* (1897) I L R 24 C 216, not followed.

Second appeal against the decree of the Court of the Subordinate Judge of Madura in A. S. No. 40 of 1920 (Appeal Suit No. 32 of 1920 on the file of the District Court of Madura), preferred against the decree of the Court of the

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*S A No. 1115 of 1921. 7th March, 1924.

Palani v. Sethu.

First Additional District Munsif of Madura in O. S. No. 124 of 1919 (O. S. No. 23 of 1918 on the file of the Court of the Principal District Munsif of Madura).

K. V Krishnaswami Aiyar for appellant.

C. V. Ananthakrishna Aiyar, P. S. Narayanaswami Aiyar and *P. S. Ramachandra Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—In this case an interesting question arises for decision regarding the legitimacy of the plaintiff. The plaintiff's mother, Pechi Ammal, was first married to one Subramania Thevan in September or October, 1903. That marriage, it is found, was dissolved in May or June, 1904, and then she married again one Thirumeni Thevan in June or July, 1904. The plaintiff was born to her in September, 1904. These are the findings of fact by the lower Courts.

The question that has to be decided is whether on these facts the plaintiff is to be treated as the legitimate son of Thirumeni Thevan and is entitled to a share of his properties as the District Munsif has held, or whether he is not the son of Thirumeni Thevan but the legitimate son of Subramania Thevan as the Subordinate Judge seems to consider. Pechi Ammal's marriage with Subramania Thevan did not prove to be a happy one. Thirumeni Thevan seems to have conceived a great regard for her and was a rival for her affections from the very commencement. Subramania Thevan and Pechi Ammal seem to have quarrelled with each other and she left his protection, and there was a criminal case in which Subramania Thevan charged Thirumeni Thevan and others that his wife had been enticed away by Thirumeni Thevan for the purpose of illicit sexual intercourse with her. In that case however the accused were discharged ; thereupon Subramania Thevan divorced his wife. The District Munsif has held that Thirumeni Thevan is really the father of the plaintiff and that he had access to Pechi at the time the child was begotten even though she was the wife of Subramania Thevan. He also refers to evidence which shows that Thirumeni Thevan treated the young boy as his own son till his death in April, 1917.

The question whether the plaintiff is to be treated as the legitimate son of Thirumeni Thevan or not seems to me to depend entirely upon the language of S. 112 of the Evidence

Act, which lays down the rule which really governs this case. That section says that "the fact that a person is born during the continuance of a valid marriage between his mother and a man" (leaving out unnecessary words) "shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.'" In this case the plaintiff was born during the continuance of a valid marriage between his mother and Thirumeni Thevan. The section is very clear, and unless non-access of Thirumeni Thevan to her is proved at the time when the plaintiff would have been begotten, he must necessarily be treated as the legitimate son of Thirumeni Thevan, for the section says that the fact of birth must be taken as conclusive proof of the son's legitimacy. A married woman might have many paramours, but, the child born to her must be treated under S. 112 as the legitimate son of her husband, and the fact that she has paramours is of no account whatsoever unless her husband, if he disputes the paternity of the child, is able to show that he had no access to her at the time of conception. The fact that other people had also access is not material in considering the legitimacy of the child. That is the rule framed by the Legislature in S. 112 and we must follow that rule in dealing with questions of legitimacy. The difficulty that arises in this case is from the fact that at the time conception must have taken place the plaintiff's mother was the lawful wife of Subramania Thevan. The Subordinate Judge seems to think that because she was Subramania Thevan's lawful wife it must necessarily be presumed that Thirumeni Thevan had no access to her. I am not prepared to adopt such a presumption particularly in this case where the evidence points the other way, as the District Munsif has clearly explained. There is absolutely no evidence as to non-access of Thirumeni Thevan at the time the child was begotten. Applying S. 112 the question raised in this case must be answered in favour of the Munsif's view that the plaintiff is the legitimate son of Thirumeni Thevan. The mistake made by the Subordinate Judge is in failing to notice that S. 112 refers to the point of time of the birth of the child as the deciding factor and not to the time of the conception of that child. The point of time of the conception of the child has to be considered only to see whether the husband had not access to the mother. If he had access then the child

Palani v. Sethu.

that is born must be treated as the child of the father. A case *Ingestre* v. *Attorney-General* seems to have been recently decided in the same way in England where a question exactly similar to this arose. I have not been able to refer to the case itself, for it seems to have been reported only in *The Times* newspaper. But the case is referred to in a learned article in 30 *Law Quarterly Review*, which deals with this question. The conclusion which the writer of that article comes to is that the decision makes it clear that the rule in modern English Law is that birth in wedlock makes a child legitimate and the only ground for disputing its paternity is to show that the father had no access to the mother at the time the child was begotten, and no other exception is allowed. That seems to be clearly the English Law. S. 112 of the Evidence Act is really based upon the English rule, and its language clearly supports the view I am taking that the child born in wedlock should be treated as the child of the father who was then the husband of the mother unless it is shown that he had no access to the mother at the time of conception quite irrespective of the question whether the mother was a married woman or not. It is quite true that if the plaintiff had been born within 280 days after the dissolution of the marriage of his mother with Subramania Thevan and if she had not been married by the time of his birth the section would have made him the legitimate son of Subramania Thevan. But those are not the facts here. The fact here is that the mother was married again before the child was born and applying the rule of S. 112 we must necessarily hold that the child is the legitimate son of the second husband. The rule may be somewhat artificial and may not always correspond with actualities in nature. But it is necessary to have a rule like this to avoid unnecessary disputes as to the legitimacy of children and the rule must be worked according to its terms.

The Subordinate Judge has relied upon a case in *Nicholas* v. *Asphar* (1). There the learned Judge no doubt held in somewhat similar circumstances that the child should be treated as the legitimate child of the first husband during the subsistence of whose marriage the child was conceived. With very great respect to the learned Judge who tried the case it seems to me that he overlooks the exact language of S. 112

1. (1897) I L R 24 C 216.

when he says at page 222 that " There is no evidence of want of access, and S. 112 of the Evidence Act, in the absence of such evidence, regards the presumption of legitimacy arising from *conception* during a valid subsisting marriage as conclusive. " In S. 112 there is no reference to conception in the first part of it. The presumption of legitimacy arises from birth and not from conception unless as already stated it can be shown by proof of non-access that conception could not have resulted from the connection of the husband with the wife.

In the view I am taking I do not think the second point dealt with by the Subordinate Judge, that the child was the result of Pechi's adulterous sexual intercourse with Thirumeni Thevan and therefore he is not entitled to inherit to him can be supported either, for the section excludes any such allegation or proof. The section says that I should take it as conclusively proved that plaintiff is his legitimate son and the question whether the original connection was adulterous or not does not arise. Treating the plaintiff as the legitimate son of Thirumeni Thevan he is entitled to a share in his property. Considering that Thirumeni Thevan was treating the plaintiff all along as his own son, and that he knew perfectly well when he married Pechi Ammal that she was a pregnant woman and yet took no objection himself to the parentage of the child and considering that in all possibility Thirumeni Thevan is the real father of the child I am glad I have been able to arrive at a conclusion in favour of the plaintiff's right to inherit to him. The parties are Maravars ; and divorces and second marriages of women are quite common among them and a man is allowed to marry more than one wife. There is thus no difficulty of the second marriage with Thirumeni Thevan being invalid or illegal.

The Subordinate Judge in paragraph 13 of his judgment states that since the law presumes chastity of a married woman it is impossible to hold that Thirumeni Thevan could have had access to Pechi Ammal. It seems to me that the latter statement of his goes too far. Whether there be a presumption or not, that a married woman is chaste, a presumption for which no authority has been quoted, it is clear that in the circumstances of this case Pechi Ammal was not chaste. She seems to have had connection with Thirumeni Thevan while she was the wife of Subramania Thevan and that was probably the reason for her divorce. The question whether he had

Palani v. Sethu.

access or had no access is a question to be decided on the evidence and on the facts proved and not on any presumptions. It was suggested that I should call for a finding from the Subordinate Judge on the question of Thirumeni's access to Pechi, but in the state of evidence which has been fully discussed by the District Munsif I think his finding is correct and it is not necessary to send the case down for a fresh finding as I can myself find the fact under S. 103 of the Civil Procedure Code. There is good reason to find that he had access to the woman at the time the child was begotten. The decree of the lower appellate Court is reversed and that of the District Munsif is restored with costs here and in the lower appellate Court.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE WALLACE.

The Commissioner of Income-tax, Madras. *Referring Officer**

v.

Nedungadi Bank, Ltd., Calicut, by its Secretary *Respondent.*

Commissioner of Income-tax, Madras v. Nedungadi Bank, Ltd., Calicut.

Indian Income-tax Act, S. 10, Sub-S. 2, Cl. (9)—Company—Profits—Business allowance—Tax on companies—Madras District Municipalities Act (V of 1920), S. 92.

Tax on companies levied under S. 92 of the Madras District Municipalities Act (V of 1920) can be deducted as a business allowance under S. 10, Sub-S. 2, Cl. (9) of the Indian Income-tax Act in calculating the profits of a company for purposes of income-tax.

Smith v. *Lion Brewery Co.,* (1911) A C 150 ; *Usher's Wiltshire Brewery, Ltd.* v. *Bruce,* (1915) A C 433 relied on.

Case stated under S. 66 (2) of the Income-tax Act by the Commissioner of Income-tax, Madras, for the decision of the question " Whether the company's tax levied under S. 92 of the Madras District Municipalities Act V of 1920 must be deducted as a business allowance under S. 10 (2) of the Income-tax Act ? "

The Government Pleader (*C. V Anantakrishna Aiyar*) on behalf of Government.

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* R C No. 10 of 1923. 19th and 21st February and 21st March, 1924.

T. V Muthukrishna Aiyar and *S. Chinnaswami* for the respondent.

Commissioner of Income-tax, Madras v. Nedungadi Bank, Ltd., Calicut.

The Court delivered the following

JUDGMENT :—This is a reference under S. 66 (2) of the Income-tax Act, and the question for decision is whether tax on companies levied under S. 92 of the Madras District Municipalities Act (V of 1920) may be deducted as a business allowance under S. 10 (2), Cl. 9 of the Income-tax Act. According to S. 92 of the District Municipalities Act, under Notification of the Chairman every company transacting business within the Municipality for profit shall pay a half-yearly tax known as " Tax on companies " on the scale shown in Sch. IV, provided it has transacted business for more than 60 days in the half-year. S. 16 of Schedule IV lays down the method of assessment, from which it is clear that the assessment is made on the paid-up capital of the company, although in certain cases if the Head Office or a Branch or Principal Office of the company is not in the Municipality, and it is able to show certain figures of gross income, the tax on the paid-up capital is to some extent reduced. The penalty for non-payment of this tax is set out in S. 30 and subsequent sections of Sch. IV. It appears quite clear that this is a tax or a toll, not on profits or on income or on profession, since it is based not on the amount of profit or salary earned, but on the paid-up capital. It is, therefore, in no sense an income or profession tax. It is a compulsory toll on such trading companies without which they are not permitted to carry on their trade for more than 60 days in any half-year. It is not strictly a license fee, but it is nearer in analogy to that than it is to an income-tax.

That being the nature of the tax or toll levied, the question is whether it is a species of expenditure (not being in the nature of capital expenditure), incurred solely for the purpose of earning profits or gains. It is clearly not in the nature of capital expenditure since it is not met out of capital and does not diminish the capital. Is it then an expenditure for any other purpose than for the purpose of earning profits or gains? We are of opinion that it is not. It is not a tax on profits or income but a necessary condition precedent to any earning of profits. It is an impost without paying which the firm cannot trade within the Municipality.

Arguments by analogy from the fact that income-tax may not be deducted in calculating the income assessable to Indian

Commissioner of Income-tax, Madras v. Nedungadi Bank, Ltd., Calicut.

income-tax are not of any help in this case since this is in no sense an income-tax. The case quoted by the Government Pleader, viz., *The Chief Commissioner of Income-tax, Madras* v. *The Eastern Extension Australasia and China Telegraphic Co., Ltd.* (1) is therefore of no assistance. Another case quoted by him appears to us equally not in point. It is *Ward and Co., Ltd.* v. *Commissioner of Taxes* (2). There it was held that money spent by a brewery company in printing and distributing anti-prohibition literature was not "expenditure exclusively incurred in the production of the assessable income" and therefore the company was not entitled to make the deduction, the ground of the decision being that such expenditure was not incurred in the production of the assessable income but was expended with a view to influencing public opinion against taking a step which would have partly destroyed the earning of profit. In the case in *The Secretary of Board of Revenue* v. *Muniswami Chetty and Son* (3) a Bench of this Court to which one of us was a party, held that expenses for legal advice in a dispute between Government and the assessee regarding excess profits duty and in drawing up an income-tax return, could not be legitimately deducted. This case also does not seem to us to assist the decision of the present case. The only useful case quoted before us are two English cases, *Smith* v. *Lion Brewery Company* (4), and *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (5) both of which support the assessee. These were cases decided under the English Income-tax Act of 1842 where a phrase not dissimilar from the phrase which we are now seeking to interpret had to be interpreted, namely, "Money wholly and exclusively laid out or expended for the purposes of such trade." In the former case a brewery company had in order to extend their business acquired certain licensed houses which they let out to tenants who covenanted to retail the company's beer. By thus becoming landlords of those licensed premises the company had to pay a statutory levy imposed by the Licensing Act of 1904, S. 3, and the question was whether such payment could legitimately be deducted in the estimate of the balance of profits and gains. The House of Lords which consisted of four learned Lords was equally divided and the decision of the

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1. (1921) I L R 44 M 489 : 40 M L J 560.
2. (1923) A C 145.
3. (1923) 45 M L J 711.
4. (1911) A C 150.
5. (1915) A C 433.

Commissioner of Income-tax, Madras v. Nedungadi Bank, Ltd., Calicut.

Court of Appeal in favour of allowing the deduction was affirmed. One of the learned Judges, the Earl of Halsbury, in that case lays down as a deciding factor in the case that a person engaging in such a business " must if he carries on that business pay this tax ; it is the Act of the Legislature which makes him pay it, and it is not a thing that is open to his own will or option. " Another learned Judge, Lord Atkinson, called it a compulsory levy and described it as an impost which " must necessarily be paid in order to set up the system which is found to be vital to their trade prospects to set up." In the second case, *Usher's Wiltshire Brewery Company, Ltd.* v. *Bruce* (5), all the five learned Judges composing the house followed the former case. That case is even stronger in the assessee's favour than *Smith* v. *Lion Brewery Company* (4). It was another instance of a brewery company acquiring and letting licensed houses to tied tenants, and it was there laid down that even expenses in respect of premiums on fire insurances over these houses and premiums on insurance against the loss of their licenses for the sale of liquor were legitimate deductions in arriving at the assessable income. These were both cases of expenses properly, though voluntarily, incurred in the extension of the trade. The companies thought it necessary for the extension of their trade that they should become themselves the landlords of the retailing houses and thereby subjected themselves to the compulsory compensation levy. The present case seems to us an even stronger one. The payment of compulsory levy to the Municipality by way of the tax on companies is not merely for the purpose of extension of trade but is a condition precedent to the exercise of the trade at all within the Municipal boundaries.

We are, therefore, clear that the payment of companies' tax compulsorily levied on this company by the Municipality is wholly and exclusively for purposes of the trade and that the object which that payment accomplishes is the same. The answer to the reference, therefore, is that the expenditure is incurred solely for the purpose of earning profits and gains, and we answer accordingly.

Costs of the reference will be taxed as on the Original Side. The assessee will get his costs from Government.

A. V. V. *Reference answered in the affirmative.*

4. (1911) A C 150. 5. (1915) A C 433.

PRIVY COUNCIL.

PRESENT:—LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

(On Appeal from the High Court of Judicature at Bombay.)

Jamnabai ... *Appellant**

v.

Fazalbhoy Heptoola and others ... *Respondents.*

P. C.

Jamnabai *v.* Fazalbhoy Heptoola.

Consent order—Setting aside of—Grounds—Consent by advocate under mistake of fact—Partners—Purchase of property by, which in partnership—Properties—Partnership properties or properties owned by puchasers as co-owners—Appeal—Judgment under—Correctness of—Presumption—Onus on appellant.

An order which was in point of fact consented to by the advocate of a party under a mistake of fact cannot be set aside except on proof that serious and substantial injustice would result to the party from letting the consent order stand.

Held, on the facts affirming the judgment of the High Court, that, in regard to properties purchased by the appellant's deceased husband and another while they were in partnership, the true position was co-ownership in the properties, and not, as alleged by the appellant, that the properties were partnership assets.

An appellant is under a duty to displace the *prima facie* assumption of the correctness of the judgment below.

(Consolidated appeals from a judgment and two decrees of the High Court of Bombay.)

De Gruyther, K. C. and *J. M. Parikh* for appellant.

Sir George Lowndes, K. C. and *E. B. Raikes* for respondents.

12th June, 1923. The Judgment of their Lordships was delivered by

Lord Sumner.

LORD SUMNER:—These are consolidated appeals by one Jamnabai, the widow and executrix of Tricum Natoo, who died so long ago as 1892. He had been a partner in a muccadamage firm, Khimji Jiwa and Co., with a gentleman called Khimji Jiwa, who had retired from the firm and had died before the time at which Tricum Natoo died. The widow Jamnabai commenced these proceedings against certain persons who continued to carry on the same business as had been carried on by her late husband in partnership, although they changed the name of the firm. She brought an action for accounts, the principal object of which, so far as the present appeals are concerned, was to obtain an account and a share of certain buildings, and the rents produced by those buildings,

*P C Appeal No. 4 of 1922. 12th June, 1923.

P. C.

Jamnabai *v.* Fazalbhoy Heptoola.

Lord Sumner.

which originally had been purchased by her late husband and his partner while they were still in partnership. The buildings consisted on the one hand of a house built on the estate of the Port Trust in Bombay, and on the other of sundry godowns which were used in some way, not very clear, down to the date of the proceedings, by the defendants.

There are two appeals, from two decrees, which have been consolidated.

The first appeal relates to the alleged right of the plaintiff to have an account taken over a long series of years of the rents and profits of the godowns, she herself bringing into account the rents of the house; but this apparently is a secondary matter, for the house has fallen into decay and is almost worthless.

The second appeal is brought in order that the appellant, Jamnabai, may have the opportunity of establishing her late husband's interest in the partnership business beyond the date to which the partnership account had been stated and balanced, and may have an account for that purpose. In order to succeed in that appeal, she has to establish her right to have an order set aside, which was in point of fact consented to by her advocate before the learned Judge who made the order. It may be convenient to dispose of the second appeal quite shortly.

The learned Judge records that when he had expressed the opinion that the form in which a previous order had been drawn up did not prevent the plaintiff from being entitled to have its terms rectified and to have the accounts, which she desired to obtain, taken on a footing wider than its terms stated, her counsel, having apparently considered the matter, intimated that he did not press to have an account actually taken and that he would be content with an order in her favour for payment of a particular sum which, according to the note which the learned Judge took, was accepted by the learned counsel, because he conceived it to be an amount agreed up to the date of the death of Tricum Natoo, whereas it appears that it was really an amount agreed only up to the date of the last adjustment made in his lifetime, which was something like two years earlier. To that extent there is ground for saying, if the learned Judge's note was correct as a statement of the reasons which prompted the advocate at the time, that the advocate gave this consent under a mistake of fact, the

P. C.

Jamnabai v. Fazalbhoy Heptoola.

Lord Sumner.

gravity of which may be substantial or may not, and when the plaintiff discovered, as she afterwards did, that this order had been made, under which she would get payment of this particular sum, but would not get the account which she desired, she took proceedings to get the consent order set aside and to prefer her claim to the account.

Their Lordships have had on both appeals the advantage of an argument from Mr. De Gruyther, on behalf of the appellant, equally illuminating and candid. With regard to this appeal he accepted as the law, which governs his position. that serious and substantial injustice to his client must be shown to result from letting the consent order stand which was made under the circumstances mentioned. There has been some controversy as to whether his client was consulted by her advocate at the time when the consent was given. Upon that the High Court expressed no definite opinion, and all their Lordships need say is that they have not formed the affirmative opinion that she and her brother, who was assisting her and was present in Court, were not cognisant of what was going on, but it is unnecessary to express a definite opinion about it. The High Court after examining the circumstances with some care came formally to the conclusion that, so far from any possible injustice having been done to the appellant by the course taken, it probably was beneficial so far as she was concerned, because, while the account which she asked for apparently might have secured some few hundred further rupees in addition to the very much larger sum that she got under the consent order, she would have had to run risks as to costs and possibly otherwise, from which it was advisable to protect her.

Their Lordships see no reason whatever for revising the opinion upon this point formed by the High Court, and that being so, the foundation upon which Mr. De Gruyther based his right to ask to have that order set aside and the account directed has failed. This appeal therefore is unsuccessful.

The first appeal Mr. De Gruyther has also frankly stated to have been rested all along upon the contention that the properties in question, the dwelling-house and the godowns, were assets of the partnership firm of Khimji Jiwa and Co., and not merely buildings which these two gentlemen, the plaintiff's deceased husband and Mr. Khimji Jiwa had bought for their own reasons, and apparently held as co-owners in equal moieties

The High Court examined the facts with some care and based their judgment upon the conclusion of fact that the true position was co-ownership in the properties and not that they were partnership assets belonging to the firm of Khimji Jiwa and Co.

Their Lordships cannot see their way upon this question of fact to say that the conclusion of the High Court in this appeal was wrong. They have been pressed by Mr. De Gruyther, who has missed no point which possibly could have been raised on behalf of his client, to say that because the record does not set out the account to which the High Court referred in one or two passages, and because it may be argued that the mode of dealing with the rents of the properties, which the learned Judges either inferred or had stated to them, might have been different, the conclusion that they were dealt with in the way assumed is one that ought not to be supported.

It appears to their Lordships that they ought to presume that the High Court did not make these statements and come to this conclusion as to the facts without having had materials before it. Although normally all the materials are to be found in the record in one shape or another, certain documents have not been printed in this record which were available in the Court below, and the proceedings were proceedings in which there was much common ground, and their Lordships therefore think that they have nothing to justify them in saying that the *prima facie* assumption of the correctness of the judgment below, which the appellant has to displace, has been successfully met.

The result therefore is that the appellant fails in this appeal also.

In their Lordships' opinion both appeals ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant : *E. Dalgado.*

Solicitors for respondents *Nicholl, Manisty and Co.*

Appeals dismissed.

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD PHILLIMORE, LORD BLANESBURGH, SIR JOHN EDGE AND LORD SALVESEN.

(On Appeal from the Chief Court of Lower Burma.)

Veerappa Chetty and another *Appellants**

v.

L. A. R. Arunachellam Chetty *Respondent.*

P. C.

Veerappa Chetty *v.* Arunachellam Chetty.

Partnership—Dissolution—Agreement at; by which firm's business and liabilities are taken over by one of the partners—Creditors not parties to—Effect of agreement upon, and upon partners inter se.

When on the dissolution of a partnership an agreement is arrived at by which one of the partners takes over the firm's assets and makes himself personally responsible for its debts and liabilities, a creditor of the firm who is not a party to the dissolution agreement is not affected by it. The direct joint liability of each of the partners to such creditor remains entirely unaffected by the execution of such agreement. But by that agreement, the partner who took over the firm's assets and liabilities, as between himself and each of his former partners, becomes solely responsible for the firm's debt to that creditor, and each of the other former partners becomes entitled to an indemnity from the partner who took over the liabilities against all liability as a former partner of his in respect of that debt. Each of the other partners is entitled to have that right of indemnity declared and enforced (by an order on the partner who took over the debts, for example, to pay off the debt) if the right were disputed or the obligation neglected. But each of the other partners is entitled to no more. He cannot recover the debt from the partners who took over the liabilities unless and until he has himself paid it.

Contract—Novation—Partnership—Debt due by—Mortgage by one of partners for—Effect—When no extinguishment of firm's debt or release of partners' liability for it.

Where during the continuance of a partnership, one of the partners executed to a creditor of the firm a mortgage to secure, *inter alia,* the debt due to him from the firm, *held,* on the evidence in the case, that the mortgage did not work either a novation of the firm's debt to the creditor or a release of any of the partners from full liability in respect of it.

Mortgage—Consideration—Onus of proof of—Suit to enforce mortgage—Transfer of Property Act Ss. 86-90—*Mortgage—Consideration for it being payment of debt due to third party by mortgagor—Non-payment thereof by mortgagee—Effect—Suit by mortgagee to enforce mortgage—Maintainability—Right to decree for sale.*

Firm *P,* of which the respondent and *V* were partners owed a debt to firm *O.* On the dissolution of firm *P,* its business was taken over by the respondent, who also became personally responsible for its debts and liabilities, including the debt due to firm *O.* On 12th May, 1910, the amount of the debt due to firm *O* was Rs 36,000. On that date the respondent executed in favour of *S,* a benamidar for *V,* a mortgage for Rs. 20,000, a promissory-note for

*P C Appeal No. 55 of 1922. 1st May, 1924.

P. C.

Veerappa Chetty *v.* Arunachellam Chetty.

Rs. 16,000, and a letter which recited the execution of the mortgage and of the pro-note, directed *S* to pay the sum of Rs 36,000, the amount secured by the mortgage and by the promissory-note, to firm *O* and to tell that firm that it should be credited towards firm *P* in their account, and promised to send *S* the money on the due date.

In a suit to enforce the mortgage of the 12th May, 1910 by the assignee, it was found that, though the deed stated to be for consideration received, and, on the face of it, bore no relation at all to the dissolument agreement of firm *P*, the record of the transaction of 12th May, 1910 was not to be found in the mortgage of that alone, but in the mortgage, the pro-note and the letter of that date, that no consideration passed for the mortgage of that date, and that the respondent was required by *V* to give to him, in the name of *S*, his *benami*, the suit mortgage and the promissory-note for the reason that firm *O* were pressing *V* to pay their debt and the respondent was neglecting to settle it. It was further found that *V* had not at the date of suit paid anything to firm *O*.

Held, that the plaintiff had entirely failed to establish any case whatever, either for a decree or for an account.

Ss. 86-90 of the Transfer of Property Act now embodied in effect in O. 34 of the Schedule to the C. P. Code protect a defendant-mortgagor against a decree for sale, unless the amount due upon his mortgage, if not admitted, has either at the hearing been proved by the plaintiff or has been ascertained after the hearing by an account then directed on, of course, a case for the taking of such an account having by evidence first been made.

Appeal from a decree and judgment (8th March, 1920) of the Chief Court of Lower Burma, reversing a judgment (2nd August, 1918) of the District Judge of Myaungmya decreeing the appellants' suit.

One Veerappa Chetty (father of the plaintiff), with the respondent (L. A. R. Arunachellam Chetty) as manager and three others carried on business in partnership as money-lenders at Myaungmya under the firm name of P. V. D. V. The firm did not succeed, and had to resort to borrowing. On the 11th January, 1910, while it was in difficulties and already owed a sum of Rs. 42,000 to O.A.M. K. Ramaswami Chettiar, another money-lender in Rangoon, besides debts to other creditors, it received a sum of Rs. 18,000 through a *hundi* of Rangoon, and Veerappa executed a mortgage of his own separate properties to secure this total debt of Rs. 60,000 to O. A. M. K. On the 2nd March, 1910, the P. V. D. V. partnership was dissolved by agreement between Veerappa and Arunachellam, Veerappa agreeing to pay for his share of the losses a sum of Rs. 71,000 due to six named persons, and Arunachellam taking over the rest of the P. V D. V. firm's assets and liabilities including the debt due to O. A. M. K.

P. C.
Veerappa Chetty v. Arunachellam Chetty.

On the 12th May, 1910, the respondent executed a mortgage of Rs. 20,000 upon three steam-launches and one room in a house to Sethuraman Chetty, managing partner of the firm of P. P. A. R. R. M. *benami* for P. V. D. V. Veerappa Chetty providing for the repayment of Rs. 8,000 on 13th May, 1912 and the balance on 13th May, 1913, and a promissory-note for Rs. 16,000, thus making up the sum of Rs. 36,000 then due from the P. V. D. V. firm to the O. A. M. K. firm of Rangoon, and requested Sethuraman Chetty by letter of the same date (12th May, 1910) to pay that amount to O. A. M. K. to be credited to P. V. D. V. in their account. The mortgage was transferred by an Indenture dated 25th July, 1916 to P. V. D. V. Mutha Chetty (father of the appellants), who, on the 12th August, 1916, instituted a suit in the District Court of Myaungmya to recover the balance Rs. 12,000 principal and Rs. 5,746-14-6 alleged to be due on the mortgage and prayed for the usual mortgage-decree under O. 34 of the First Schedule to the Civil Procedure Code (replacing Ss. 85—90 of the Transfer of Property Act, IV of 1882).

The respondent, by his written statement filed the 30th November, 1916, admitted execution of the mortgage-deed, but pleaded that there was no consideration for the mortgage ; and that it had been executed merely on Veerappa's assurance that the mortgagee would accommodate the respondent, if necessary, to the extent of Rs. 20,000, which necessity never arose, and consequently no money was ever advanced upon the mortgage. He, therefore, pleaded that the mortgage was void for want of consideration.

The following issues were framed for trial :—

1. Was the mortgage-deed without consideration ?

2. Did the defendant or any person on his behalf pay Rs 8,000 towards principal, and Rs 3,270-7-0 towards interest, and make endorsements to that effect on the deed ?

On the 2nd August, 1918, the District Judge (Po Bye, Esq.), who tried the action, pronounced judgment passing a decree in the plaintiff's favour. This judgment and decree were reversed on appeal on the 8th March, 1920 by the Chief Court of Lower Burma (Twomey and Young, JJ.) who held that (1) the firm P. P. A. R. R. M. Sethuraman Chetty was merely *benami* for P. V. D. V. Veerappa Chetty, and that the

P. C.

Veerappa Chetty v. Arunachellam Chetty.

assignment of the mortgage-debt to Veerappa Chetty's son (the plaintiff Mutha Chetty) was merely a restoration of the property comprised in the mortgage-deed by the nominal to the real owner (2) no money was actually paid by the mortgagee at the time of the mortgage and that the firm P. P. A. R. R. M. Sethuraman Chetty had never financed the respondent at all ; hence there was no consideration for the mortgage, and the plaintiff's suit was accordingly dismissed with costs. The appellants, as the sons and legal representatives of Mutha Chetty, the original plaintiff, thereupon appealed to His Majesty in Council.

De Gruyther, K. C. and *Narasimham* for appellants.

Dunne, K. C. and *Gerard Saunders* for respondent.

1st May, 1924. The Judgment of the Board was delivered by

Lord Blanesburgh.

LORD BLANESBURGH :—This is a suit to enforce by an order for sale a mortgage of certain property in Upper Burma, made by the respondent in favour of the assignor of the original plaintiff.

The case comes before their Lordships on an appeal from an order of the Chief Court of Lower Burma dismissing the suit, and discharging a decree for sale of the mortgaged property—which had been made by the Trial Judge in the District Court of Myaungmya. The question is whether there was adduced by the plaintiff at the trial evidence sufficient to justify an order for sale of the mortgaged property.

Such suits as the present are governed by Ss. 86—90 of the Transfer of Property Act, 1882. In effect these sections, now embodied in O. 34 of the Schedule to the Code of Civil Procedure, protect a defendant-mortgagor against a decree for sale, unless the amount due upon his mortgage, if not admitted, has either at the hearing been proved by the plaintiff or has been ascertained after the hearing by an account then directed on, of course, a case for the taking of such an account having by evidence first been made.

The solution of the problem so presented to their Lordships has proved to be one of some difficulty. Veerappa, a protagonist in the transactions in question, to whom reference will constantly be made in the sequel, had died before the suit was commenced. His side of the case was testified to by

P. C.

Veerappa Chetty v. Arunachellam Chetty.

Lord Blanesburgh.

witnesses whose information was to a large extent secondary. The evidence too, so far as it is really material, was taken on commission by means of interrogatories not very happily framed, while, for reasons, the adequacy of which their Lordships do not presume to question, cross-examination of the plaintiff's witnesses was disallowed.

The facts up to a point, however, are not in doubt, and, as it happens, documentary evidence is available at critical stages in the story to supplement or correct the verbal testimony and clear up what would otherwise have been obscure. It is possible, therefore, with sufficient accuracy to ascertain the relevant facts.

The mortgage in suit originates in the arrangements made upon the dissolution in March, 1910, of a money-lending business carried on at Myaungmya and two other places in Upper Burma under the style of P. V. D. V. The partners in that firm were the appellants' grandfather, Veerappa, the respondent, and three other persons. The respondent was the manager of the business at Myaungmya and resided there. Veerappa lived at Rangoon.

By the end of 1909 this business had proved to be unsuccessful serious losses had been sustained indebtedness had increased Veerappa was proposing to make India his permanent place of residence and dissolution of the firm was in prospect.

In January, 1910, P. V. D. V. had amongst their creditors a Rangoon firm of money-lenders, O. A. M. K. On January 11, 1910, the P. V. D. V. debt to O. A. M. K. was Rs. 42,000. On that day Veerappa, at Rangoon, granted in favour of O. A. M. K. a mortgage on separate property of his own to secure Rs. 60,000, with interest. The Rs. 60,000 were made up of the Rs. 42,000 debt of P. V. D. V. and a further sum of Rs. 18,000, then proposed to be advanced to Veerappa by O. A. M. K., but never in fact advanced.

Much was made of this mortgage in the course of the discussion before the Board. It is convenient to dispose at once of one important argument with reference to it put forward by the appellants' learned counsel.

The effect of the mortgage was, he said, to discharge the Rs. 42,000 debt of P. V. D. V. and relegate O. A. M. K. for

their sole remedy in respect of that debt to Veerappa and to the security upon his property created by the mortgage.

Their Lordships can see no ground for this suggestion. It is quite clear from the accounts of P. V. D. V., from later receipts given by O. A. M. K., from payments to O. A. M. K. subsequently made by the respondent on behalf of P. V. D. V., to mention only these salient facts, that this mortgage operated neither a novation, nor an extinction of the firm's debt to O. A. M. K.

On the 2nd March, 1910, the dissolution of the partnership of P. V. D. V. took place. Its terms are recorded in an agreement executed by all the partners. Veerappa thereunder made himself personally responsible for the liabilities of the firm to six named creditors the respondent took over the business and made himself personally responsible for the remaining debts and liabilities of the partners in relation to it.

Amongst these was the debt of the firm to O. A. M. K. That debt is separately entered in a credit balance sheet prepared for dissolution purposes, as amounting on 1st March, 1910, to Rs. 41,055-3-6.

The dissolution so agreed to was duly effectuated, and the P. V. D. V. businesses were taken over by the respondent and carried on by him, under the style of L. A. R., all as provided by the dissolution agreement. Payments to O. A. M. K. were made—not by Veerappa, be it noted—as a result of which the dissolved firm's indebtedness to O. A. M. K. had, by the succeeding 12th May—the date of the mortgage in suit—become reduced to Rs. 36,000.

It is convenient now to consider what, as at that date, was the position, in which, in relation to this debt as one of the old firm's liabilities assumed by him, the respondent stood to Veerappa. That position may be easily stated.

O. A. M. K. were no parties to the dissolution agreement. The direct joint liability of each of the partners to them remained entirely unaffected by its execution.

But by that agreement the respondent, as between himself and each of his former partners, became solely responsible for the firm's debt to O. A. M. K., and Veerappa as one of these partners became entitled to an indemnity from the respondent against all liability as a former partner of his in respect of it.

P. C.

Veerappa Chetty v. Arunachellam Chetty.

Lord Blanesburgh.

And he was entitled to have that right of indemnity declared and enforced (by an order on the respondent, for example, to pay off the debt) if the right were disputed or the obligation neglected.

But he was entitled to no more. Veerappa could not recover the debt from the respondent unless and until he had himself paid it. Give Veerappa that right and the result might have been—for it would equally be the right of the three other partners—that the respondent would be exposed to the risk of having to pay the debt twice over at the least. To put this in other words, Veerappa at this date had paid to O. A. M. K. nothing in respect of this firm debt. There was accordingly at that time no existing relation of debtor and creditor in respect of it between the respondent and himself.

It is in these circumstances that the mortgage in suit was executed by the respondent on the 12th May, 1910. It is expressed to be made in favour of one Sethuraman, who was a money-lender of Rangoon. It purports to be made in consideration of Rs. 20,000 borrowed by the respondent from him. The receipt for Rs. 20,000 is acknowledged in the body of the deed. Interest on the whole sum runs from the date of the deed. It is first payable on the 13th May, 1911. Rs. 8,000 of the principal with accrued interest are payable on the 12th May, 1912 the remaining Rs. 12,000, with interest on the 13th May, 1913.

On its face, whether in respect of the amount secured or the person to whom that amount is due or otherwise, this mortgage bears no relation at all to the dissolution agreement, to the then amount of O. A. M. K.'s debt, or to Veerappa. It purports to record an independent transaction of loan of Rs. 20,000 by Sethuraman to the respondent. And in the plaint in this suit it is so put forward by the original plaintiff, who sought to enforce it solely in the character of an assignee from Sethuraman. But in the course of the proceedings it became common ground that the mortgage, in its terms, records no transaction that ever happened.

The appellants admit that no money at all was lent by Sethuraman to the respondent, nor is it denied by them that the documentary record of the transaction that took place on the 12th May, 1910, is to be found not in the mortgage alone; but in that mortgage, in a promissory-note for Rs. 16,000

P. C.

Veerappa Chetty v. Arunachellam Chetty.

Lord Blanesburgh.

made by the respondent also in favour of Sethuraman, and in a letter, Exhibit H, then written and addressed by him to Sethuraman. These documents were all handed by the respondent to Veerappa at Myaungmya on the 12th May, 1910 on his demand. They show, and in particular Exhibit H shows, that the whole transaction was directly connected with the liability of the respondent as between himself and Veerappa to discharge the P.V.D.V. debt to O.A.M.K., by that time reduced as above stated to Rs. 36,000, which is the combined amount of the mortgage and the promissory note.

The following is the material part of Exhibit H :—

" Corresponding with the 30th (Sitrai) I have mortgaged you my three launches and one-sixth portion of the pucca building, containing six rooms, of this place" [the property comprised in the mortgage suit] "for Rs. 20,000 by means of registered deed. Further, I have executed a promissory-note for Rs 16,000 in your favour. Pay the above amount of Rs 36,000 to O. A. M. K. for 30th Sitrai, and tell them that it should be credited towards P. V. D. V. in their account. I will send you the money on the promised date."

In view of the fact that Veerappa is now dead and can himself give no account of it, and that there is a conflict between the witnesses for the plaintiff and the respondent as to the genesis of this transaction of the 12th May, 1910, the importance of this exhibit can hardly, in their Lordships' judgment, be overestimated.

Its preservation—it was produced in the suit by the plaintiff—relieves them for example from the necessity of determining as between the parties the gravely disputed question with reference to the position which Sethuraman was represented to the respondent as occupying. The respondent's story was that he never would, under the dissolution agreement, have assumed the O. A. M. K. debt had not Veerappa promised him that when necessary he would find a lender ready, upon security, to advance to the respondent the sum necessary to pay off O. A. M. K. Sethuraman, the respondent goes on to say, was put forward to him by Veerappa as the lender he had found in pursuance of his promise. The case of the plaintiff, on the other hand, was that Sethuraman was all through known to be, as in fact he was, merely benami for Veerappa.

Exhibit H enables their Lordships to proceed without expressing any conclusion of their own upon this issue. It enables them, indeed, to act upon the appellants' version of the transaction which was that the respondent was required by Veerappa

P. C.

Veerappa Chetty v. Arunachellam Chetty.

Lord Blanesburgh.

to give to him, in the name of Sethuraman, his benami (for he was himself about to depart to India), the mortgage in suit and the promissory note, for the reason that O. A. M. K. were pressing Veerappa to pay their debt and the respondent was neglecting to settle it. All this may be accepted. It still leaves the question unresolved why the respondent, who, as their Lordships have just shown, was not at the time liable to pay Veerappa anything in respect of the O. A. M. K. debt, should by the mortgage in suit have been taken bound to make payment to his nominee of Rs. 20,000, with interest from the date of the deed, all irrespective of any payment of that sum or any part of it by Veerappa, either to O. A. M. K. or to himself.

That question is answered by Exhibit H which, in their Lordships' view when properly understood explains with quite sufficient clearness the whole transaction even accepting the plaintiff's witnesses' account of it so far as that account goes. Apart from, and notwithstanding Mr. de Gruyther's contention to which their Lordships will recur in a moment, it is impossible to read Exhibit H without seeing that it was dealing with a real advance of Rs. 36,000 to be made to the respondent. The mortgage deed and promissory note to which it refers bear that that sum had actually been received by the respondent and was to be repaid by him with interest as therein respectively provided. Exhibit H is the direction to Sethuraman or, if you will, to Veerappa as lender, by the respondent as borrower, instead of paying them to himself to pay over to O. A. M. K. the Rs. 36,000 advanced and secured in discharge of the P. V. D. V. debt for which, as we know, as between the respondent and Veerappa the respondent was solely liable. The payment so directed was to be made as on the very day of the mortgage and at Rangoon. On the footing that it would be so made it instructed accurately enough the statement in the mortgage executed at Myaungmya that Rs. 20,000, the portion of the advance thereby secured, had that day been paid to the respondent, and it justified the obligation to pay interest on the full amount as from the same date.

The respondent does not dispute that if such payment had been made to O. A. M. K., as directed by him, there would have been then no further question as to his liability to repay it in terms of his mortgage. But there never was any such payment made. This was apparently admitted in the Chief Court.

P. C.

Veerappa Chetty v. Arunachellam Chetty.

Lord Blanesburgh.

It was not suggested by Mr. de Gruyther, before their Lordships, that there had. It is indeed quite clear that there had not. What then is the position ?

The answer of the learned Trial Judge was based upon a misapprehension. He found that the payment had been made, and accordingly he ordered a sale. But his finding arose from a misreading, on this part, of an entry in Sethuraman's books. In these there is entered as on the date of the mortgage, a credit of Rs. 20,000 in favour of Veerappa and a corresponding debit against the respondent. But Sethuraman being only a nominee of Veerappa, these entries import no more than a recognition on the part of Sethuraman that the sum expressed by the mortgage to be owing by the respondent belonged to Veerappa and not to himself. The entries in no way import that any sum was on that day paid by any one to any one else—least of all that any sum was on that day found or applied by either Veerappa or Sethuraman for any purpose of the respondent. The learned Trial Judge, however, mistakenly treated the entry in Sethuraman's books as a credit to O.A.M.K., and as evidence of a payment made on that day by Sethuraman to them. It was a clear misapprehension on the part of the learned Judge and Mr. de Gruyther not suggesting before their Lordships that any such payment had been made, did not seek to support the learned Judge's order directing a sale on the ground that it had. His main contention before the Board, indeed his only contention on the appeal, was that that learned Judge's order should be restored on an entirely different ground.

To the foundation of this contention of his, their Lordships have already alluded. Veerappa's mortgage to O.A.M.K. of the 11th January, 1910, extinguished, he said, all liability on the part of every one but himself for the P. V. D. V debt to O. A. M. K. That being so the reference to that debt in the dissolution balance sheet operated to entitle him, in place of O. A. M. K., to receive payment of it from the respondent. On that footing the recital in the mortgage in suit that Rs. 20,000 had been advanced by Veerappa's nominee, Sethuraman, to the respondent was quite correct, Veerappa, as between himself and the respondent being entitled to recover from the latter every part of the O. A. M. K. debt. Whatever arrangement he might or might not himself make with O. A. M. K. for its ultimate liquidation, that full debt the respondent was bound to pay Veerappa under the dissolution

P. C.

Veerappa Chetty v. Arunachellam Chetty.

Lord Blanesburgh.

agreement on demand. The mortgage in suit and the promissory note were the terms on which Veerappa was willing to give him time for payment.

Their Lordships hope that they have correctly stated the contention. In their judgment the argument breaks down at every point of fact. First of all, as they have already shown, the mortgage of the 11th January, 1910, did not work either a novation of the O. A. M. K. debt or a release of the respondent or any partner of P. V. D. V. from full liability in respect of it. This of itself destroys the whole contention. But, further, if by the date of the dissolution agreement, the O. A. M. K. debt had ceased to be a partnership liability, then under that agreement the respondent did not contract to assume it. It was only firm liabilities that the respondent assumed. But still further the view of the respondent's and the P. V. D. V. position involved in this contention is completely negatived by the terms of Exhibit H. It follows in their Lordships' judgment that the order of the Trial Judge directing a sale can no more be justified on the ground suggested by Mr. de Gruyther than it can on the ground taken by the learned Judge himself.

That the Trial Judge's order was erroneous was made clear on appeal to the Chief Court. The learned Judges of that Court fully appreciated the error of fact into which the Trial Judge had fallen, and they, it being admitted before them that no payment as directed by Exhibit H had been made to O. A. M. K., held that the suit should be dismissed on the ground that the mortgage in suit had no consideration to support it and created no security for any sum whatever upon the property comprised in it. Their Lordships do not agree. If the suit is to be dismissed it must be on some ground other than that chosen by the Chief Court. When the position in which the respondent stood towards Veerappa in relation to this O. A. M. K. debt is remembered, there was in their Lordships' judgment ample consideration to support the mortgage. Veerappa, when it was given, was entitled to require, as their Lordships have shown, that the respondent should, under his indemnity, procure Veerappa's release from his joint liability in respect of it, and most effectively, by making immediate payment to O. A. M. K. of the P. V. D. V. debt. Veerappa stayed his hand on the terms that by the grant of the mortgage to his nominee the respondent's indemnity should bcome to the extent of Rs. 20,000 and interest, a secured instead of an

P. C.

Veerappa Chetty v. Arunachellam Chetty.

Lord Blanesburgh.

unsecured indemnity. The consideration for the mortgage was therefore complete and the judgment of the Chief Court was, in their Lordships' opinion, to this extent erroneous.

But the result reached by the Chief Court may properly be arrived at in another way. It is clear that the real consideration for the mortgage is not therein correctly expressed. The true consideration their Lordships take to have been proved by the appellants themselves, and the resultant operation of the mortgage follows as a consequence from a consideration of the antecedent relations between the parties to it and the provisions of Exhibit H. To the extent of Rs. 20,000 it stands as a security for such sums as Veerappa shall pay towards discharge of the P. V D. V. debt to O. A. M. K. with interest, at the mortgage rate, from the date of each payment respectively.

Had then Veerappa paid any such sums at the commencement of this suit ? In the opinion of the Board no such payments were proved. Whatever may be the true explanation of the receipts endorsed by Sethuraman on the mortgage deed—a question which their Lordships do not consider it necessary to discuss—they represent no payments by or on behalf of Veerappa. Nor is any claim on that footing put forward in respect of them by the appellants. One or two witnesses for the plaintiff said Veerappa had not made any payments and there is no evidence or suggestion to the contrary. Strangely enough a representative of O. A. M. K. was amongst the plaintiff's witnesses. He gave no evidence of any such payment.

In these circumstances it appears to their Lordships that the plaintiff entirely failed at the hearing to establish, under the sections already referred to of the Transfer of Property Act, any case whatever, either for a decree or for an account.

Their Lordships will accordingly humbly advise His Majesty that this appeal from the Order of the Chief Court should be dismissed with costs.

Solicitor for appellants *E. Dalgado.*

Solicitor for respondent : *A. M. Bramall.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD BLANESBURGH AND LORD SALVESEN.

(On Appeal from the High Court of Judicature at Allahabad.)

Sahu Ram Kumar ... *Appellant*[1]

v.

Muhammad Yaqub and another ... *Respondents.*

P. C.

Sahu Ram Kumar *v.* Muhammad Yaqub.

Contract—Building contract—Commission to owner of 10 *per cent. on cost of materials used—Right, to—Original contract stipulating for such commission subsequently substantially varied at instance of owner—No stipulation for commission in new contract—Effect.*

A contractor accepted the offer from the owner of certain land for the construction within 12 months of a one-storeyed house on the land for the price of Rs. 21,000, subject to a commission or rebate, computable upon completion, of 10 per cent. on the price of the materials in favour of the owner. As the work progressed, certain additions and alterations thereto were required by the owner which enhanced the cost of the work to nearly twice the original amount. Finally, the work was stopped and the buildings left unfinished as a result of differences and disputes between the contractor and the owner, the former alleging that the owner's refusal of further advances prevented him from proceeding with the work, and the owner declining to make further payments because he considered he had, after allowing for his aforesaid commission or rebate, overpaid by about Rs 10,000. In an action brought by the owner claiming from the contractor refund of this excess, *held,* (affirming the judgment of the High Court) that the commission or rebate was (1) only due in respect of the original contract for the building of a one-storeyed house, and not of the subsequent additions or alterations ; (2) only exigible when the work was completed, and the final accounts between the parties at the end of the stipulated period of one year made up. As the entire contract was not in fact, and in its nature was incapable of being completed within the year, the conditions for computing such deduction never arose, and the failure to complete was not due to the contractor, but to the owner who forfeited the benefit of the stipulation as to the rebate.

Appeal by special leave of His Majesty in Council against a judgment and decree (4th March, 1919) of the High Court of Judicature at Allahabad, reversing a judgment and decree (30th September, 1916) of the Additional Subordinate Judge at Moradabad, decreeing the plaintiff's claim.

On the 26th May, 1913, the plaintiff (appellant) applied to the Municipal Board at Moradabad for sanction to construct a single-storey *kothi* or building in accordance with a plan which he submitted. On the 27th May, Muhammad Yaqub (the

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[1] P C Appeal No. 1 of 1923; All. Appeal No. 29 of 1919. 12th February, 1924.

first defendant-respondent) sent a written tender for the said construction as follows :—

"To

"SAHU RAM KUMAR,

"*Rais* and Honorary Magistrate,

"Thakurdwara, Moradabad.

"Sir,

"In compliance with your order, the undersigned applicant is willing to construct the new *kothi* in the bagh near the distillery in Mauza Manpur, at the rate specified below less Rs. 10 per cent. for commission. Rs. 500 will remain (with the applicant) as an advance, which will be deducted from the amount of the last bill. If the work is done honestly and well, something by way of reward may (kindly) be allowed (to the undersigned) from the Rs. 10 per cent. commission. Money may be paid weekly for purchase of materials and payment to labourers, a roughly prepared bill thereof will be submitted to you continually. If any materials, *e. g.*, iron, timber, etc., are received from out-stations, money may be paid at once on production of the invoice and the Railway receipt therefor, undersigned will not be responsible for any demurrage, etc., that may have to be paid owing to late payment of money. The undersigned therefore submits these few words to you by way of a memorandum, they may be accepted as a matter of favour and a letter intimating acceptance given to the undersigned in order that work may be started within this month.

"If necessary a formal agreement will be registered later on. It is prayed that Rs 500 may be given to the undersigned by way of an advance along with the letter of sanction. Whatever money the undersigned takes, a receipt thereof shall be given by him under his own signature.

(Sd.) MUHAMMAD YAQUB, in autograph."

"27th May, 1913."

On the 28th May, the tender being accepted, Rs. 500 was paid as an advance to Muhammad Yaqub and a receipt was given by him to indicate formal acceptance and agreement. Sahu Bishandar Saharan (the second defendant-respondent), a relation of the plaintiff, was surety for Muhammad Yaqub carrying out the contract.

On the 29th July, 1913, the plaintiff applied to the Municipal Board for further sanction to carry out the following additional structures on the same site :—

1. Boundaries with *gumtis* (small rooms or cabins).

2. Required to add another row of out-houses, together with a tank.

3. Required to build a reservoir together with a temple. The existing *chabutra* of Mahadeoji will be enclosed.

4. Latrines for the out-houses attached to the *kothi*.

P. C.

Sahu Ram Kumar v. Muhammad Yaqub.

5. Bath-rooms for the *kothi* in which pots (commodes) will be used.

6. Four *chabutras* (platforms) will be constructed.

If anything more will be required it will be shown in the plan.

And on the 1st August, 1913, he wrote to Muhammad Yaqub:

MUHAMMAD YAKUB,, Mistri, may you live long,

"You should, in consultation with Munshi Muhammad Ali, make some such arrangement as to have the boundary-wall ready up to the 18th of August. Treat it as an *urgent* matter.

"(Sd.) R. KUMAR."

On the 20th September, 1913, the plaintiff presented a further application to the Municipal Board for sanction to build according to the following specifications :—

"1. It is required to build an enclosure of the garden within the *pucca kothi* for females, together with room door-frames and door-leaves.

It is required to build privies attached to the *kothi* for femaels. A kitchen and a bath-room appertaining to the *kothi* for females will be constructed and rooms, a privy and a bath-room also will be constructed on the upper storey."

And again on the 1st March, 1913, another application thus :—

"1. Permission has already been given for the construction of the *kothi* (but) some alterations are to be made in several rooms.

"2. A wall to the west will be constructed.

"3. An upper storey is required to be built on the existing *kothi*."

Soon after the 28th May, 1913, the contractor (first defendant) commenced the construction work, and the plaintiff made various further advances from time to time. On the 13th June, 1914, the contractor wrote to the plaintiff as follows :—

"To

"SAHU RAM KUMAR,

"Sir,

"*Rais* and Honorary Magistrate of Thakurdwara.

"I beg to say that it is very necessary that the undermentioned work in the upper storey, in connection with the construction of the *kothi* at Mauza Manpur Narainpur should be completed before the rains set in. Rs. 500 are required for meeting expenses. This amount may kindly be paid to me. I shall finish the said work within 25 days. If I show any slackness or if, within the said period the building is damaged in any way I shall be liable to construct it afresh.

Details of the Work.

"1. A drain for flow of the rain water on the upper storey.

"2. Painting of the *kachcha* masonry work on all the four sides, on the upper storey.

"3. Preparation of cornice *gola* and *tora* on the upper storey.

"4. Plastering the walls of room on the upper and lower storey, in case it rains—area to be plastered, 1,500 sq. ft.

"5. Stone pavement in the verandah, towards the south, in the lower storey, in case it rains.

"Your obedient servant,
"(Sd.) MUHAMMAD YAQUB,
"Contractor, resident of Moradabad,
"Muhalla Nai Basti."

"To

"SAHU RAM KUMAR,

"Rais and Honorary Magistrate, Thakurdwara.

"Sir,

"I most respectfully beg to state that it is necessary that the work specified at the foot hereof, in connection with the construction of the upper storey of the *kothi* at mauza Manpur Narainpur, should be completed before the rains, and Rs 500 are needed for meeting the expenses. Therefore, I beg to request that the aforesaid money may kindly be sent to me. I shall complete the said work within 25 days. If there is any delay on my part, or if any damage is done to the building, within the aforesaid time, I shall be liable to do the said work *de novo* and to finish it.

Specification of Work.

"Tin sheet spout for flow of rain water from the upper storey of the *kothi*. Painting the brick-work in mud, on all the four sides of the upper storey of the *kothi*. Cornice *gola* and *tora* of the upper storey. Plastering 1,500 sq. feet of rooms, on the upper storey or on the ground-floor in case it is raining.

"In case it is raining, 600 feet of stone pavement of the verandah, towards the south, on the ground-floor.

"Petitioner :—Muhammad Yaqub, Contractor, resident of muhalla Nai Basti at Moradabad."

and upon receiving the advance of Rs. 500 asked for, signed an acknowledgment in the following terms :—

"I, Muhammad Yaqub, son of Alim Ullah, by race a Shaikh and resident of muhalla Nai Basti at Moradabad, do declare as follows :—

"According to the application, dated the 13th June, 1914, for expenses in connection with the construction of the *kothi* at the grove in mauza Manpur Narainpur, I received payment of money from Sahu Ram Kumar, through Pandit Makkhan Lal, general attorney, under a cheque for Rs. 500, bearing No. 7797 M|2, dated the 21st April, 1914, on the Allahabad Bank, Moradabad. The said amount will be set off against the account of construction specified in the said application. Therefore, I have executed this stamped receipt, so that it may serve as evidence."

(One anna stamp label.)

"(Sd.) MUHAMMAD YAQUB, in autograph.

P. C.

Sahu Ram Kumar v. Muhammad Yaqub.

Witnesses :--

(Sd.) ABDUL JABBAR KHAN, in autograph.

(„) BISHAMBAR DAYAL.

(„) TAHIR ALI, the scribe of this receipt, in autograph."

Soon thereafter, the contractor, who had by then received from the plaintiff advances amounting to Rs. 38,400 stopped work.

On the 9th August, 1915, the plaintiff commenced the present action in the Court of the Additional Subordinate Judge of Moradabad for Rs. 9,562-11-5 (principal), and Rs. 1,243-2-2 interest at 12 per cent. per annum as damages for breach of contract by the first defendant, the second defendant being joined as surety. He alleged in his plaint, in addition to the facts above set forth, that when he insisted on the defendant's finishing the work and furnishing an account and measurements of what had been done, the work was stopped. that the plaintiff got the works measured and found that their true cost was Rs. 28,562-4-7 only, *i. e.*, Rs. 9,562-11-5 in excess of his advances, of which he claimed the refund, with interest as aforesaid.

The first defendant's written statement, filed the 24th September, 1915, pleaded that (*a*) the original contract of the 28th May, 1913, had been suspended by the course of subsequent dealings between the parties, and that, in fact, there was a new arrangement between them in consequence of certain alterations in the plan of construction of the work, the plaintiff having called upon him to build a new *kothi* of larger dimensions and of greater cost than that of the original contract (*b*) the plaintiff had called upon him to build a temple, tank, gateway, and boundary wall, all to be completed within a short time (*c*) there was a new agreement between them as to the rates whereby the figures originally quoted were not to be subject to a discount of 10 per cent (*d*) there were other variations in the rates, particularly as to girders ; (*e*) the work was stopped in September, 1914, because the plaintiff failed to keep him in funds, and that a sum of Rs. 8,000 was actually due to him by the plaintiff for work done after giving credit for all advances received.

The following issues were framed by the Additional Subordinate Judge :—

" 1. What was the contract between the parties about the construction of the *kothi* and what rates were settled ?

"2. Whether a deduction of 10 per cent. from the rates were settled between the parties, if so, on what conditions and was an oral agreement made to forego this deduction and is such oral agreement valid ?

"3. Whether the defendant agreed orally to allow Rs. 10 instead of Rs. 8 per cwt., and was such an oral agreement valid ?

"4. Who was responsible for delay in construction and for stopping of the work and how does this affect the suit ?

"5. How much stock of the defendant No. 1 is on the spot and should its price be credited in the account ?

"6. What works have been done by the defendant No. 1 and of what value ?

"7. Whether any amount is due from the defendant to the plaintiff on the account ; if yes, how much and is the defendant No. 2 liable for it ?

"8. To what relief is the plaintiff entitled ?"

On the 30th September, 1916, the Subordinate Judge (B. Ramachandra Saksena, Esq.) delivered judgment, deciding the first, second and fourth issues in the plaintiff's favour and remarking—

"In this case parties have been examined at a great length, but I am not inclined to place much reliance upon their evidence and I cannot but consider their evidence as that of interested party, although two of them, namely, plaintiff and defendant No. 2 hold a high position in life, as it is my experience that persons when they file or defend a suit on certain allegations whether right or wrong stick to them in their sworn testimony also, however high their position in life may be, without any regard to truth. Sahu Bishambar Saran, defendant No. 2, being chiefly interested in the result of the case, his evidence cannot be accepted as the evidence of independent man......

"The defendant had not been able to satisfy me that the *kothi* has been built on a larger scale and that fact alone would not alter the rates on which the defendant agreed to conduct the *kothi* .... The defendant is not correct that in the beginning a single-storied *kothi* was in contemplation, and that it was subsequently changed to two-storied as Bishambar Saran himself admits that in the plan there was perhaps an idea of the two-storied *kothi*."

On the third issue, he held that the defendant had failed to prove that the plaintiff had agreed to allow Rs. 10 per cwt. on the rate for the girders. As to the fifth issue, he held that the materials, valued by the defendant at Rs. 4,935-11-9 and bought for the construction of other buildings also of the plaintiff, should be taken over by the plaintiff or the defendant at the figure of Rs. 4,625-10-9, or should be sold, and the money realised therefrom should be paid to the plaintiff towards satisfaction of the decree. In conclusion, the Court held that the cost of the work done by the defendant amounted to Rs. 32,801-2-6, from which the plaintiff was entitled to deduct

10 per cent., leaving a balance of Rs. 29,521-1-8 ; and deducting this sum from Rs. 38,400, total advances admittedly received by the defendant, a decree was passed in the plaintiff's favour for Rs. 8,281-10-0 with interest at 6 per cent. per annum from the date of institution of the suit.

The defendants appealed, and the High Court of Judicature at Allahabad (Rafique and Lindsay, JJ.) on the 4th March, 1919 allowed the appeal and dismissed the plaintiff's suit, holding that there had been no breach of contract by the first defendant, and observing :—

"Our examination of the plaintiff's evidence leads us to the conclusion that it ought not to be acted upon and we are unable to come to any finding in his favour on the strength of any statement made by him. In the course of his deposition he made certain statements which we find to be untrue. In the first place he was questioned regarding an estimate which was supplied to him in the early part of 1914 by one Bansidhar who was called as a witness in the case. The evidence of Bansidhar was to the effect that having been called in by the plaintiff for the purpose of preparing a rough estimate of the cost of the buildings which were then under construction, he informed the plaintiff that the approximate cost would be Rs 42,000. The plaintiff on being examined regarding this, denied that any such estimate had been given to him. It is proved, however, by a document which the plaintiff himself produced, that this denial is untrue. He put into Court the notes prepared by Bansidhar, and we think an attempt had been made to rub out a portion of these notes which had been written in pencil and which showed that Bansidhar had, as a matter of fact, informed the plaintiff that in all probability the whole of the building would cost him about Rs 42,000. Another statement to which the plaintiff committed himself was that the *kothi* as it stood at the time of suit was smaller in dimensions than the original *kothi*. This is proved by documentary evidence on the record to be absolutely untrue......

"We may refer in the first place to the tender made by the defendant-contractor on the 27th May, 1913. It is proved that an application for permission to build was filed on behalf of the plaintiff in the Municipal Office, Moradabad, on the 26th of May, 1913. To this application there was attached a plan, a copy of which is on the record. From this document it is clear that the building originally contemplated was a single-storied *kothi* of specific dimensions and there can be no manner of doubt that the tender made by the defendant-contractor was made with reference to this specification. The Subordinate Judge is clearly wrong when he says that the defendant failed to satisfy him that the first contract related only to a single-storied *kothi*. The documentary evidence on this point is quite conclusive........

"It seems clear to us that so far as subject-matter of the agreement was concerned, the original contract between the parties had been substantially altered. The one-storied *kothi* had become a two-storied house. It is proved that the additional works were all carried out while the *kothi* still remained unfinished, a circumstance which corroborates the story put forward by the contractor that the plaintiff was trying to hurry on the works.

P. C.

Sahu Ram Kumar v Muhammad Yaqub.

"In these circumstances it is difficult to see how the plaintiff can have his case of breach of contract, upon the terms of the first agreement. We have already expressed the opinion that the variations and additions made in the original arrangements must have altered the conditions of the work. The new arrangement was obviously bound to involve the plaintiff in a much larger outlay than he originally contemplated both, because he wanted to have more work done and because he wanted the work done in a hurry. Rustamji, the expert witness, who was employed by the plaintiff, admits that where work has to be hurried it costs more and that after all, is only in accordance with common sense. It is not shown that the work actually done by the defendant-contractor was bad work. On the contrary Rustamji admits that the work was well done and worth the full rates entered in the Schedule of the 27th of May, 1913 without any Rs. 10 per cent deduction.......It seems therefore fairly certain that before the month of June 1914, the plaintiff had been told by Bishambar Saran and by Bansidhar that the whole work would probably cost about Rs. 40,000, and we are inclined therefore to believe that having become alarmed at the prospect of so much expenditure he began to withhold funds. We find therefore that the plaintiff has failed to prove that the stoppage of the work was due to any default on the part of the defendant-contractor.......Even on Rustamji's evidence the value of the work done by the defendant *plus* the value of the materials on the site comes to all but Rs 37,000. In addition to the works to which we have referred, the defendant-contractor claims for other works done for the plaintiff and with respect to these items he put in two bills, B-18 and B-19, the total of which comes to Rs. 740 odd. With regard to the items contained in these bills the lower Court has allowed only Rs. 497-4-6. The fact however remains that the contractor swore to the correctness of these bills and the plaintiff never cross-examined him on the point. The items in bill B-18 are mostly small items showing wages paid to labourers for doing odd jobs of work between June and November, 1913, and we can see no good reason for refusing credit to the defendant-contractor for the sums covered by these two bills. If we add therefore to the sum already mentioned this sum of Rs. 740-1-6 we find that the defendant-contractor has carried out work of the value of Rs. 37,695-4-9 or roughly speaking Rs. 38,000 and taking into account the possibility of error in estimating the value of the materials on the site, a matter to which we have already referred, our conclusion on the whole is that the plaintiff has failed to show that he has advanced to the defendant any money in excess of the value of the work already done."

Against this judgment, the plaintiff obtained special leave to appeal to His Majesty in Council, and the main question raised on the appeal was whether and how far the plaintiff was entitled to the rebate of 10 per cent. on the prices of materials (the second issue before the Trial Judge).

De Gruyther, K. C. and *Parikh* for appellant.

Dunne, K. C. and *Wallach* for respondent.

12th February, 1924. The Judgment of their Lordships was delivered by

Lord Shaw.

LORD SHAW:—This is an appeal from a decree of the High Court of Judicature at Allahabad dated the 4th March,

P. C.

Sahu Ram Kumar v. Muhammad Yaqub

Lord Shaw

1919. This decree reversed that of the Additional Subordinate Judge of Moradabad dated the 30th September, 1916, decreeing the plaintiff's claim.

A building contract by way of offer and acceptance had been concluded between the plaintiff, appellant, who was the owner of certain land, and the respondent, a builder apparently in a humble way of business, who was a contractor. Certain subsidiary matters of accounting were referred to in the minute argument delivered before the Board. Even if that argument had been in all points sound, it would have resulted in a relatively trivial readjustment of the figure of the alleged balance. Their Lordships content themselves with observing that the appeal is decided upon a consideration of the only ground which appears in the reasons of the appellant. It is not legitimate to raise at this Board other and subsidiary points which were apparently neither raised nor canvassed in the Courts below.

The reasons for the appellant's appeal to this Board are substantially confined to one point. That has reference to a 10 per cent. allowance, to be made by the contractor to the owner " for commission. "

The Board will now proceed to discuss the matter in the light of the contract between the parties. The form of the suit is by the owner against the contractor for a sum amounting to nearly Rs. 10,000, on the allegation that that Rs. 10,000 consisted of over-payments made by him as compared with the sums to which the contractor was entitled under the bargain. The appellant made certain strong allegations against the respondent and declined to make further advances, and the work was stopped.

Their Lordships refer in particular to the offer of the 27th May, 1913. The early portion of that offer is in these terms, and it is that early portion which raises, and completely raises, the question now at issue before the Board :—

" In compliance with your order the undersigned applicant "—that is, the contractor—" is willing to construct the new *kothi* in the bagh near the distillery in mauza Manpur at the rate specified below, less Rs. 10 per cent. for commission. Rs 500 will remain as an advance, which will be deducted from the amount of the last bill. If the work is done honestly and well, something by way of reward may kindly be allowed to the undersigned from the Rs. 10 per cent. commission. "

There is further reference in the acceptance to what is manifest, and is agreed, was a most important circumstance, namely, that the work was to be done within one year. In the acceptance of the offer this and another point are made clear, namely (1) " you should within a year construct " the building, and (2) " if you would require money during the progress of the work you will continue to get money weekly also according to need." Finally it may be stated that under the contract no provision or bargain is made as to additions or alterations.

Their Lordships have carefully considered the ambit of these clauses. It appears to the Board to be clear that the contract refers to one particular building, the size, dimensions and even plans of which had already been fixed. The new *kothi* thus singularised was that which had been the subject of an application, with submitted plans, to the local authority and by that date approved.

As this contract work proceeded, however, it was found that the views of the owner were very much larger than those for which he had obtained the specific sanction. Within a few weeks of the acceptance of this contract radical changes began to be ordered by the owner. To speak roughly, those consisted of the doubling of the size of the main building itself; it was converted into a two-storey instead of a one-storey building ; a large, and apparently extensive, compound was walled in, and various other buildings, including a temple. These were made the subject of orders from the owner, and work proceeded accordingly. None of these items, as already mentioned, were within, at least, the express scope of the original contract.

Their Lordships are clearly of opinion that the arrangements thus made, forming an addition of a kind so substantial as to increase the original cost from Rs. 21,000 to nearly Rs. 42,000, must be attributed to a new arrangement between the parties, and that that arrangement could not, in point of fact, have been completed within anything like the stipulated period of 12 months applicable to the first and definitely limited contract.

In those circumstances it was quite clear that the builder still required, and possibly in even a fuller degree, to be accommodated with cash to enable him to undertake the heavy

P. C.

Sahu Ram Kumar v. Muhammad Yaqub

Lord Shaw

and fresh obligations under the new contract. It is also further clear on the facts that when payments to account, or payments to discharge builders' accounts or the accounts of persons supplying material, were made no deduction of 10 per cent. commission was in fact made from these. These facts have a real bearing on the question of what was the stage at which such an allowance was to be made.

It appears to their Lordships that upon a review of the first contract it is plain that the arrangement by way of rebate or a deduction of 10 per cent. commission in favour of the owner, was an arrangement which was only exigible and became crystallised when the work was completed and the final accounts at the end of the year were to be made up. Upon that occasion the Rs. 500 originally advanced was to be deducted from the cumulative sum due to the builder, and further the estimate of the 10 per cent. commission would be made, not from the sums paid but from the scheduled rates for the articles supplied, whatever their cost had been. After this reckoning was made within or at the close of the year, there would be completely determined the amount of the debt falling under the 10 per cent. commission charged. It was then, in those circumstances, that the opportunity would have arisen to the owner, to forego making that large deduction from his contractor's prices, and to limit the 10 per cent. by such an allowance as was left to his own goodwill. But the conditions for making such a deduction never arose ; the contract was not possible of completion within the year ; it in point of fact was not completed and the Board agree with the High Court that the failure to complete was not due to any fault on the contractor's part. The stipulation accordingly disappeared.

A fortiori, in their Lordships' opinion such a deduction was never agreed to with regard to the further work. What was done was that it entered into the head of the owner that he had largely over-paid the contractor. As it turns out this idea of his was illusory' he had not done so. On the best computation that can be made the accounts were fairly square, even at the old rates.

In those circumstances, when a suit was brought for the sum of nearly Rs. 10,000 of alleged over-payment, the parties most sensibly agreed that a skilled referee should settle the amounts. Nor does the Board question the propriety of their

P. C.

Sahu Ram Kumar *v.* Muhammad Yaqub.

Lord Shaw

having said to the referee that they were willing that the rates charged in the original schedule should be made applicable to the extra works executed. But the question remains as to what was to be done with regard to what one might call the prolocation of the right to deduct 10 per cent. commission. In the opinion of the Board there was no such prolocation. It would have required a special and particular contract to make such a charge applicable to a condition of affairs entirely new.

Their Lordships, however, are further relieved to find that the referee, looking over the charges and the work, does go into the question of whether the work was fairly charged at the contract rates without any allowance being made for the 10 per cent. commission. He gives evidence which is thus narrated in the judgment of the High Court " Rustamji "— that is, the arbiter—" admits that the work was well done and worth the full rates entered in the schedule of the 27th May, 1913, without any Rs. 10 per cent. deduction. " No injustice as between these parties entering into this mercantile contract is to ensue. The contrary is the case. The allowance of the 10 per cent. which is now claimed in this suit by the owner of this piece of land would be an allowance which would permit him to pay only 90 per cent. of the value of the work which is actually on his property.

Their Lordships are satisfied that the result arrived at by the High Court is sound ; and they will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitor for appellant : *E. Dalgado.*

Solicitors for respondents *T L. Wilson & Co.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

Ramani *alias* Venkatramani and others ... *Appellants** (*Defendants Nos. 3 to 5*)

v.

M. Narayanaswami Iyer and others ... *Respondents* (*Plaintiff and defendants Nos.* 1 *and* 2).

Ramani v. Narayanaswami Iyer.

Civil Procedure Code, S. 21—Transfer of territorial jurisdiction—Effect on pending proceedings—Objection—Waiver—Appeal.

In a suit on a mortgage an application for the appointment of a receiver *pendente lite* was made. Issues were framed in the case and afterwards the application for a receiver was heard. Before delivery of judgment on the application, the territorial jurisdiction of the Court was transferred by a notification of the Government and vested in another Court. In spite of this the former Court proceeded to deliver judgment appointing a receiver, without any objection to its jurisdiction being taken by the parties. The defendants appealed against the order appointing a receiver on the ground, *inter alia,* that the Court ceased to have jurisdiction over the cause at the time when the order was made. *Held,* that S. 21, C. P. Code, governed all cases of want of territorial jurisdiction and that the appellants not having taken objection to the passing of the lower Court's order must be held to have waived objection on the ground of want of jurisdiction and could not raise the same objection on appeal especially as there had been no failure of justice.

Zemindar of Ettiyapuram v. *Chidambaram Chetty,* (1920) I L R 43 M 675 followed.

Appeal against the order dated 22nd October, 1923, of the Court of the Subordinate Judge of Mayavaram in I. A. No. 228 of 1923 in O. S. No. 98 of 1922.

T. R. Venkatrama Sastri for appellants.

T. R. Ramachandra Aiyar and *S.R. Dixit* for respondents.

The Court delivered the following

Odgers J.

JUDGMENTS :—*Odgers, J.* :—In this case the suit was on a usufructuary mortgage-bond executed by the 1st and 2nd defendants to the plaintiff, the 1st defendant being the father of defendants 2, 3 and 4. The last two are the appellants before us. The 3rd and 4th defendants, who are undivided members of a joint Hindu family which owns apparently large properties, have brought the suit to set aside the suit mortgage

*A A O No. 377 of 1923. 29th January, 1924.

Ramani v. Narayanaswami Iyer.

Odgers, J.

alleging *inter alia* that the document was only intended to operate if, on taking the accounts between the defendants and the plaintiff, any amount was found due from the latter to the former. The matter before us arises directly out of the petition for the appointment of a receiver in the Mayavaram Sub-Court in which the suit had been instituted. The suit was numbered 98 of 1912. Argument was heard, on the 19th September, 1923, the petition was adjourned for orders to the 21st September. For various reasons, the order was not pronounced till the 2nd October, 1923, when the plaintiff was appointed receiver. The difficulty arises from the fact that on the 1st October, 1923, a notification of Government took effect by which the local limits of the jurisdiction of the Mayavaram Sub-Court were changed and the Nannilam Munsif in which the lands in question are situate was transferred to the Tiruvalur Sub-Court. The first question raised before us in appeal from the order appointing the plaintiff receiver is that on the 2nd October the learned Subordinate Judge of Mayavaram had no jurisdiction to pronounce the order which is therefore void. The notification unfortunately does not save "pending suits, and we had a long argument chiefly based on *Subbiah Naicker* v. *Ramanathan Chettiar* (1) and *Seeni Nadan v. Muthuswami Pillai* (2) on a question whether the Court to which the jurisdiction has been transferred is the only Court which can execute a decree passed by the Court from which the jurisdiction has been transferred. In my opinion, it is quite unnecessary to examine the cases on this subject for the learned Vakil for the petitioner at a late stage of his argument propounded other authorities to show that the learned Subordinate Judge had no jurisdiction. It may be premised that authority on this question is scanty. We have however a Full Bench decision of this Court. *The Zemindar of Ettiyapuram* v. *Chidambaram Chetty* (3), which lays down that S. 21, C. P. Code applies to objections with regard to want of territorial jurisdiction. Further Wallis, C. J. there said "S. 21 forbids any appellate or revisional Court to allow any objection as to the place of suing unless it was taken in the Original Court and even then unless there was a consequent failure of justice. The effect of the section, in my opinion, is that objection which the Appellate or Revisional

1. (1914) I L R 37 M 462 : 26 M L J 189.
2. (1919) I L R 42 M 821 37 M L J 284.
3. (1920) I L R 43 M 675 39 M L J 203.

Ramani v. Narayanaswami Iyer.

Odgers, J.

Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree in the Original Court."

S. 21 is inapplicable in terms to the present case because issues have been settled in the mortgage suit, and the section provides that any objection should be taken at or before such settlement and that no objection shall be allowed unless there has been consequent failure of justice. It is quite obvious that the objection could not in this case have been taken before or at the settlement of issues at which date the Mayavaram Sub-Court had full territorial jurisdiction over the subject-matter in dispute. It is objected that, the transfer having been made on the 1st October when something in the nature of an application in arrest of judgment should have been put in by the appellant on the 1st or 2nd of October before the learned Subordinate Judge delivered his order and he not having done so, the appellant must be debarred from raising any objection now to the validity of the judgment. With this contention I agree. It has been held in the Full Bench case referred to that if no objection to jurisdiction is raised on the passing of a preliminary decree on a mortgage, it cannot be raised afterwards in execution. There the reasons are based on the wording of S. 47, C. P. Code, but it seems to be that the principle is that objection should be taken under S. 21 at the earliest possible opportunity and if it is not then taken, the objector is debarred from raising it afterwards. The objection further will be disallowed unless there has been a failure of justice.

The cases *Jyoti Prakas* v. *Bagala* (4), *Vajechand* v. *Nandram* (5) and *The Queen* v. *The Inhabitants of Denton* (6) were all cases of jurisdiction over the subject-matter and therefore do not apply to the present case. As pointed out by Mookerjee, J. in the first of these cases the distinction between territorial jurisdiction and that as to the subject-matter is fundamental.

Moreover, it was held by Phillips and Venkatasubba Rao, JJ. in Appeals Nos. 312 and 329 of 1920 that the principle underlying S. 21, C. P. Code, is that objection to territorial jurisdiction may be waived. So here it may be said that the appellant not having taken objection to the passing of the

4. (1922). 36 C L J 124.
5. (1907) I L R 31 Bom 545.
6. 18 Q B 761.

Ramani v. Narayanaswami Iyer.

Odgers, J.

Sub-Judge's order must be held to have waived his objection to his doing so on the ground of want of jurisdiction.

As to this question the Full Bench thought it unnecessary to deal with it or whether the words "place of suing" were not wide enough to include objections to the place of prosecution as well as of instituting suits. Wallis, C. J., however, with whose judgment the other members of the Court agreed, appears to me to have been inclined to the opinion that they were. This really concludes the point under discussion.

I am, therefore, of opinion that this objection ought to have been taken before the judgment was pronounced and that, no objection having been taken, the appellant must be taken to have waived all objections to the pronouncement by the Subordinate Judge of his order. In any case, the question is entirely technical as regards the circumstances of the present appeal and I am, for the reasons given, of opinion that the objection to the appeal under S. 21, C. P. Code, must be upheld.

Moreover, I am of opinion that no failure of justice has taken place. It is, therefore, necessary to shortly consider the merits which have been argued before us at great length. The appellant argued that there was no case made out for a receiver. I am not prepared, on a consideration of the whole of the documents filed, to come to a conclusion against that of the Subordinate Judge in this matter. The plaintiff and defendants, or at least the 1st defendant's father, have been close friends for a number of years and the friendship was apparently only broken when the question of settlement of accounts occurred between them. The defendants are rich men. The plaintiff was in management of the properties, it is said, by the defendants' consent. The plaintiff is also said to have been trusted by the 1st defendant as a man of business to look after the properties as his agent. For a number of years the plaintiff appears to have occupied a position of trust with regard to the 1st defendant, but it is said by the latter that at the end of 1921, the plaintiff was removed from his position. If that is so, it is rather significant that the plaintiff in January, 1922, appears to have paid the cist on the plaint land. The allegation for the plaintiff is, of course, that he was never a manager but that he was in possession in his own right. The plaintiff is not in possession of the mortgage-bond on which he sues, but that is apparently in the possession of the defendants' agent who was also the *kariastan*. The Subordinate

Ramani v. Narayanaswami Iyer.

Odgers, J.

Judge has come to the conclusion that the plaintiff ought to remain in possession until the decision of the suit. I am not prepared to say that he has exercised his discretion wrongly. I refuse to interfere with his appointment of the plaintiff as receiver and dismiss the C. M. A. with costs.

Wallace, J.

Wallace, J. :—There is no need to re-state the facts of this case. The first point for decision is whether any want of jurisdiction exists. This depends on the answer to the question whether, when a particular local jurisdiction of one Court is transferred to another by notification under Ss. 10 or 11 of the Madras Civil Courts Act, such transfer carries with it automatically all pending suits and proceedings of any and every sort arising out of that local jurisdiction, so that the Court in which they were originally filed loses jurisdiction and the Court to which the local jurisdiction is transferred assumes it. This seems to be a point not free from difficulty, and I can find no direct authority on it. If a Court having a particular local jurisdiction is abolished and another Court takes over that jurisdiction, it seems to me that the latter takes over all pending proceedings in the former. The principle is that only the Court, in whose local jurisdiction the suit arises, can deal with all proceedings of a civil nature in that jurisdiction, whether previously pending in other Courts or not, so if any fresh application had to be put in in a suit, arising in a local jurisdiction since transferred to another Court, the applicant would have to be guided as to the forum for his application by considering not whether the suit had been instituted in a particular Court but which Court has local jurisdiction within the local limits from which his application arises. It is difficult to see why a Court having local jurisdiction should not have jurisdiction to receive such an application, and, if it has such jurisdiction, the other Court cannot have that jurisdiction also.

As regards the cases cited before us, that of *Subbiah Naicker* v. *Ramanathan Chettiar* (1) is at least authority for the proposition that when, after an order for sale in execution was passed by one Court, the local limits of the jurisdiction of that Court were so altered that the property fell within the local limits of another Court's jurisdiction, the former Court loses its control over the execution proceedings which pass automatically to the latter Court. The case of *Subbayya* v. *Rachayya* (7) also favours the view that the Original Court

1. (1914) I L R 37 M 462 : 26 M L J 189. 7. (1914) I L R 37 M 477.

Ramani v Narayanaswami Iyer.

Wallace. J.

in which a suit on contract was first instituted ceased to have jurisdiction when the place where the contract was made was taken away from its limits. I do not find that the Full Bench case in *Seeni Nadan* v. *Muthuswami Pillai* (2) in any way overrules this general proposition. It proceeded on the general bearing of Ss. 37 and 38 of the Civil Procedure Code which allow a decree-holder to apply for execution to the Court which passed the decree as well as to the Court having local jurisdiction, if that is a different Court. There is in that report no expression of any doubt as to the proposition that, generally and apart from the provisions of Ss. 37 and 38 of the Civil Procedure Code, when the local jurisdiction has been transferred from one Court to another, pending civil proceedings in the former Court are automatically transferred to the latter ; and Sadasiva Aiyar, J. held to his former view in *Subbiah Naicker* v. *Ramanathan Chettiar* (1), see his remarks in *Seeni Nadan* v. *Muthuswami Pillai* (2) "The fact that at a particular time the Court was competent to pass a decree for sale cannot mean that its jurisdiction to proceed further could be retained for ever." The cases in *Ranganatha Rao* v. *Hanumantha Rao* (8) and *Mouna Guruswami Naicker* v. *Sheik Mahommadhu Rowther* (9) also support the general proposition advanced above ; and also all the cases in which the power of a Court, which passed the decree, to execute it after its local jurisdiction has been transferred have been considered, for example, *Manavikraman* v. *Ananthanarayana Iyer* (10), all of which cases assume that with the transfer of local jurisdiction the power to execute follows automatically. *See* also *Venkataraov.Sastha Iyer* (11). It is difficult therefore to say that the view that a Court must have territorial jurisdiction all through the trial of a suit before it is an unsound one, and I am inclined, as at present advised, to the view that the transfer of local jurisdiction does automatically effect the transfer of all pending suits and proceedings arising originally from that local jurisdiction. In the present case, then, the Sub-Court of Mayavaram lost jurisdiction over this suit and all proceedings therein on the 1st of October and had therefore no jurisdiction to deliver the order under revision.

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1. (1914) I L R 37 M 462 26 M L J 189.

2. (1919) I L R 42 M 821 37 M L J 284.

8. (1922) I L R 46 M 1. 9. (1922) I L R 46 M 83 43 M L J 713.

10. (1924) 46 M L J 250 (1924) M W N 38. 11. (1914) 2 L W 255.

Ramani v. Narayanaswami Iyer — Wallace, J.

The next question is whether the petitioner is estopped by force of S. 21 of the Civil Procedure Code from raising in this Court the plea of want of jurisdiction in the Mayavaram Sub-Court. He is met by the other side by the argument that, as he did not, on the 2nd October, on which date the Sub-Court passed the order in this case, object to the Sub-Court so pronouncing its order, he is precluded by S. 21 of the Civil Procedure Code from now raising that contention. Again there is some lack of authority to guide us on this point. The nearest case on the point which I am able to trace is the Full Bench in *Zemindar of Ettiyapuram* v. *Chidambaram Chetty* (3), where it was held, first, that S. 21 governs all cases of lack of territorial jurisdiction, secondly, that it applies to execution proceedings, that is, to proceedings after the decree in a suit, and thirdly, that a party cannot plead in execution that the decree under execution was passed without jurisdiction. The third point is not applicable to the present case. The answer to the second does not appear to be of much help in deciding as to the validity of applying S. 21 to proceedings in suits after issues have been framed and before decree is passed. The answer of the Full Bench was given on the narrow ground that the want of jurisdiction to pass a decree is ordinarily not open as a ground of attack on appeal or revision, and that S. 21 forbids such attack unless it was made in the original Court and unless the want of jurisdiction led to a failure of justice. The reasoning set out at page 686 seems to suggest that S. 21 forbids any objection as to want of territorial jurisdiction being raised on appeal or revision unless it was raised in the original Court. That again being based on an interpretation of the phrase 'objection as to the place of suing' in the section, which was held to mean objection to the institution of the suit on the ground that the Court in which it was instituted had not jurisdiction over the property which was the subject-matter of the suit. I am not sure that the Court further held that the phrase 'institution of the suit' covered all proceedings in the suit after the institution. That the Court felt this difficulty is plain from the passage in page 687 "It is unnecessary to consider whether those particular words may not be read as applying only to cases where it is possible to take the objection at or before the settlement of issues, and whether the words 'place of suit' are not wide enough to in-

3. (1920) I L R 43 M 675 39 M L J 203.

clude objections to the place of *prosecuting* as well as of instituting suits," and the case was finally decided on the assumption that, even if S. 21 did not apply, the jurisdiction of the Court which passed the decree could not be questioned in execution, for which proposition there was direct authority. So, I find no clear guidance in this ruling as to whether S. 21 applies when during the pendency of a suit and after the framing of issues the local jurisdiction from which the suit arose has been transferred to another Court, and whether all proceedings in that suit after the transfer, if taken in the original Court, would be void.

On this point I find myself most in agreement with the referring judgment of Seshagiri Aiyar, J. who points out that to hold that the phrase 'place of suing' is synonymous with territorial jurisdiction is to hold that jurisdiction may be conferred by consent or at least by silence and by refraining from objecting to it.

I consider, however, that I must follow the Full Bench ruling in so far as it lays down that S. 21 governs all cases of want of territorial jurisdiction. In that case this plea of want of jurisdiction shall, under the section not be entertained unless *inter alia* there has been a consequent failure of justice. On the merits, I agree with my learned brother for the reasons given by him that the petitioner has not made out any case of failure of justice consequent on this want of jurisdiction and I therefore agree that the C. M. A. must fail and be dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VENKATASUBBA RAO, J.

Sivapatha Mudaliar *Petitioner** (*Complainant*)

v.

S. K. Abdul Razak *Respondent* (*Accused*).

Madras District Municipalities Act (V of 1920), Ss. 54 (b) (ii) and 59 (c) —Offence under—Deposit—Object of—No costs or compensation ordered—Deposit to be returned.

It is not an offence under S. 54 (*b*) (*ii*) of the Madras District Municipalities Act to say of a candidate for municipal election "He failed in getting elected in his own place and has come here expecting to be elected."

*Cr R C No. 696 of 1923.
(Cr R P No. 555 of 1923). 28th February, 1924.

Sivapatha Mudaliar *v.* Abdul Razak

The deposit required under S. 59 (*c*) is presumably intended as security for costs incurred by the accused and compensation, if any, payable. Where a Court in dismissing a complaint has not directed payment of costs or compensation, the intention of the legislature must be taken to be the amount should be refunded to the complainant.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional First Class Magistrate of Saidapet in C. C. No. 37 of 1923.

V. L. Ethiraj for petitioner.

The Public Prosecutor and *V. Visvanatha Sastri* for respondent.

The Court made the following

ORDER :—The question to be decided is, did the accused commit an offence under S. 54 (*b*) (*ii*) of the Madras Act V of 1920 ? It enacts "Every person who publishes statements which he knows to be false and which materially affect a candidate or his election shall be punished with imprisonment which may extend to six months."

The statement which the accused is alleged to have made is this:—"P. W. 1, *i. e.*, the complainant, failed in getting elected in his own place and had come to Saidapet expecting to be elected." For deciding whether this statement materially affects the candidate or his election, I have first to consider the nature of the statement itself. I fail to see what bearing this statement can have upon the result of the election. If the complainant had in truth been defeated at a previous election held at another place, it does not follow that he will meet with defeat at the subsequent contest.

The second point to be considered is, whether, the persons to whom the statement is made are likely to be influenced by it. They are Municipal Councillors and intelligent persons and, as the Magistrate remarks, friends of the complainant.

I think that the Magistrate's conclusion that the act complained of does not amount to an offence under S. 54 (*b*) (*ii*) is correct and I must therefore uphold the order of acquittal.

A subsidiary question has been raised regarding the deposit of Rs. 200 made by the complainant. Under S. 59 (*c*) it is a condition requisite for the filing of a valid complaint. The complainant has failed to establish his case. The Act is

silent with regard to what is to happen to this sum. Presumably the deposit is intended as security for costs incurred by the accused and compensation, if any, payable. The complainant has not been ordered to pay costs or compensation. The intention of the legislature must be taken to be that in the circumstances the amount should be refunded to the complainant. It will accordingly be paid to him. I am not called on to decide whether this is or not a fit case for the award of compensation, and I make no pronouncement on the matter.

T. S. V *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Venkatasubba Chettiar *Petitioner in both** (*Respondent*)

v.

Sesha Iyer *Respondent in both* (*Petitioner*).

Madras District Municipalities Act (V of 1920), S. 303—Rules framed under—R. 6—Enquiry into election dispute—Power of Court to issue interim injunction—Discretion—C. P. Code, S. 94 and O. 39, R. 2—Applicability of.

A District Judge inquiring into a petition contesting the validity of an election to a Municipal Council under Madras Act V of 1920, has no power, statutory or inherent, to restrain the successful candidate by interim injunction from taking his seat in the Council pending the enquiry. R. 6 of the Rules framed by the Local Government for the decision of election disputes has not the effect of making the provisions of S. 94 and O. 39, R. 2, C. P. Code, applicable to election inquiries.

Sarvothama Rao v. Chairman, Municipal Council, Saidapet, (1923) 45 M. L J 23 referred to.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the orders of the District Court of Trichinopoly, dated 30th October, 1922 and 3rd November, 1922, in I. A. No. 625 of 1922 and I. A. No. 630 of 1922, respectively, in O. P. No. 147 of 1922.

Dr. S. Swaminathan for petitioner.

T. R. Venkatrama Sastri and *K. S. Sankara Iyer* for respondent.

The Court delivered the following

JUDGMENT :—This is a petition under S. 115 of Act V of 1908, and S. 107, Government of India Act.

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*C R P Nos. 808 and 809 of 1922. 6th March, 1924.

Venkatasubba Chettiar v. Sesba Iyer.

Petitioner and respondent were the only two candidates at the election held on 22nd September, 1922, for the appointment of a councillor to represent the 12th Ward of the Trichinopoly Municipality. The petitioner was declared duly elected and respondent filed a petition before the District Judge of Trichinopoly under the rules framed in accordance with S. 303 (2) (*b*), Madras Act V of 1920. While the inquiry into this petition was pending the respondent applied in I. A. No. 625 of 1922 purporting to be under Ss. 94, 141, 151 and O. 39, R. 2 of the Code of Civil Procedure that the present petitioner be restrained by a temporary injunction from taking his seat in the Municipal Council until the disposal of the petition. In his order on this application, dated 30th October, 1922, the District Judge restrained the petitioner by interim injunction from taking his seat in the Council. Hence this revision petition.

The question for determination is whether the District Judge had jurisdiction to pass such an injunction. Rule 1 of the Rules for the decision of disputes as to the validity of an election lays down that no election held under the Madras District Municipalities Act shall be called in question except by an election petition presented in accordance with these rules. Under R. 6, " Every election petition shall be inquired into by the Judge as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code, 1908 to the trial of suits." It is argued for the petitioner that ' procedure applicable to the trial of suits ' cannot include the power to pass an interim injunction, while on behalf of respondent it is contended that R. 6 does convey such power and in any case, the District Judge has a residuary power which enables him to take such action under the Code as may seem proper during the course of the enquiry.

It is to be noted that the application of Civil Procedure Code to these inquiries is definitely restricted in R. 6 to the trial of suits. Had the Government intended that the Judge in an election inquiry should have the same powers as he has in the exercise of his original jurisdiction this presumably would have been stated in terms. In this connection R. 6 may be compared with S. 5 of the Provincial Insolvency Act where full powers are conferred upon the Insolvency Court, and the difference in the wording of the respective clauses is significant. An interim injunction can only be within the jurisdiction of the

Judge holding an inquiry into an election petition if that injunction is for the purpose of and in furtherance of the trial which he is conducting. But a temporary injunction under O. 39, R. 2 is not necessarily for the purposes of the trial. S. 94, Civil Procedure Code, out of which O. 39 arises, is framed generally, in order to prevent the ends of justice from being defeated, and then, under O. 39, R. 2, "In any suit for restraining the defendant from committing . an injury the plaintiff may apply to the Court for a temporary injunction to restrain the defendant from committing the injury." An injunction restraining an elected candidate from taking his seat may be in the ends of justice assuming that there is *prima facie* ground for holding his election to have been so irregular that any act consequential upon that election is a fraud upon the defeated candidate, but such an injunction in no way affects the conduct of the trial. A Court which issues such an injunction is really proceeding as if it were seized of the case in the ordinary exercise of its civil jurisdiction; and not as a Court inquiring under special rules into the validity of an election. And under R. 1 an election can only be called into question by a petition presented under the rules. When the party is specially prescribed from invoking the Civil Courts in the ordinary exercise of their judicial functions I can see no warrant for a Court importing into the inquiry its ordinary civil powers of its own motion, and, of course, if a Court cannot act under S. 94 and O. 39, S. 151 does not extend its powers. The learned District Judge has justified his order in I. A. No. 630 of 1922 on the ground that it is better that a councillor whose qualifications for his office are questioned does not take part in an election (*i. e.,* does not sit as councillor and vote for the election of Chairman) as that may lead to questions about the validity of the election. Had the disqualification in question been one falling within the provisions of S. 50 there could be no such difficulty because it is expressly provided in S. 51, cl. 3, that pending the decision of the District Judge after inquiry into the alleged disqualification *the councillor shall be deemed to be qualified.* By parity of reasoning I think that the councillor whose election is impugned on account of alleged irregularities may also be deemed to be qualified pending the Judge's decision.

The rules under S. 302 (2) (*b*) do not contain a provision similar to that in S. 51, but in R. 13 it is laid down that when

Venkatasubba Chettiar v. Sesha Iyer.

an election is declared void the seat of the returned candidate shall be deemed to be vacant from the date of the Judge's order, which implies that up to the date of the Judge's order the unseated councillor shall be deemed to have been qualified.

Therefore I find no reason to hold that Government must necessarily have intended that a power of granting interim injunctions should vest in the Judge inquiring under R. 6. The English decisions to which my attention has been directed, *Aslatt* v. *Corporation of Southampton* (1), *Richardson* v. *Methley School Board* (2), establish that the Court of Chancery has exercised this power of granting injunctions, but I do not think it is denied that in the exercise of their ordinary judicial functions the Indian Courts acting under O. 39, R. 2, can exercise this power. Cf. *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet* (3). The question is whether this power has been carried into the special rules for election inquiries, and in this connection the English cases are valuable chiefly as showing that such powers should be exercised with the greatest discrimination. In *Aslatt* v. *Corporation of Southampton* (1) the Corporation was restrained from declaring the office held by plaintiff void. Here, it may be noted, the *status quo* was preserved by the interim order of the Court which is very different from temporarily unseating an elected candidate.

In the course of that ruling Jessal, M. R., observes in page 148 that the mere fact that some proceeding was being taken to test a right to continue in an office was never considered a ground for interfering by injunction ; because the old Court of Chancery never interfered if a legal right only was in question. The Judicature Act, 1873, conferred upon Courts the right of granting injunctions but as a general rule the Court only interferes when there is some question of property, though there may be interference even when personal status is the only thing in question.

This case is considered in *Richardson* v. *Methley School Board* (2), where certain doubts in respect of *Aslatt* v. *Corporation of Southampton* (1) are discussed, but the Court concludes by granting a similar injunction. That the Court of Chancery has exercised this power is no warrant for assuming that it

1. (1880) 16 Ch D 143. 2. (1893) III Ch 510.
3. (1923) 45 M L J 23.

Venkatasubba Chettiar v Sesha Iyer.

was meant to be included by Government within the provisions of R. 6, and it is not disputed that Indian Courts in the exercise of their ordinary functions under the Civil Procedure Code would have such power of granting injunction. I find that the District Judge acted without jurisdiction in granting an interim injunction by his order on I. A. No. 625 of 1922, dated 30th October, 1922, and order that it be cancelled. Respondent will pay the costs to the petitioner.

The District Judge after hearing the present petitioner re-affirmed the interim injunction in his order of 3rd November, 1922, and that order is sought to be revised in C. R. P. No. 809 of 1922 which must also be allowed on the same grounds but without costs.

A. V. V *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

Minor Suyamprakasam *alias* Meenatchisundaram, by his next friend and mother Valli Ammai Achi *Appellant** (*Plaintiff.*)

v.

Murugesa Pillai *Respondent* (*Defendant*).

F. B

Suyamprakasam v. Murugesa Pillai

Minor—Agent appointed by guardian—Suit against agent—If maintainable.

A minor can maintain a suit against an agent appointed by his guardian for the benefit of the estate, in all cases and particularly in respect of properties received by the agent and not accounted for to the guardian.

Ramanathan Chettiar v. *Muthiah Chetty,* (1919) I L R 43 Mad. 429 : 38 M L J 247 overruled.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in O. S. No. 13 of 1919, dated the 8th March, 1921.

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*Appeal No. 218 of 1921. 9th April, 1924.

F. B.

Suyamprakasam v. Murugesa Pillai

Ramesam, J.

The Court (Ramesam and Jackson, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Ramesam, J. :—In this case the plaintiff, being minor by his mother and next friend, sued the defendant (his maternal uncle) for an account of his management, generally, of the plaintiff's estate from October 1910 to March 1916 and, in particular, of certain items of moveables (paddy and outstandings). The Subordinate Judge dismissed the suit following *Ramanathan Chettiar* v. *Muthiah Chetty* (1).

The plaint does not expressly say that the defendant was appointed as agent by plaintiff's mother nor have we in this case any power of attorney, as in *Ramanathan Chettiar* v. *Muthiah Chetty* (1) and in *Ramayya Chettiar* v. *Sappanimuthu Chettiar* (2). The plaint was filed prior to the decision in *Ramanathan Chettiar v. Muthiah Chetty* (1) and it cannot be said that it was cleverly worded with a view to evade that decision. The allegations are loose and general, equally consistent with defendant being regarded as an agent appointed by the plaintiff's guardian as well as with defendant being a mere inter-meddler and the guardian passively acquiescing and remaining content with defendant's promises of accounting. I do not think the allegations in paragraph 3, sub-paragraphs (2) and (3) necessarily amount to an allegation that defendant is an agent. At the same time it must be conceded that all the allegations will cover and are consistent with a case of agency. The defendant denied agency. But the Subordinate Judge without inquiring into the fact of agency and on the allegations in the plaint, held that the suit is not maintainable.

I find several difficulties in applying *Ramanathan Chettiar* v. *Muthiah Chetty* (1) to this case. First, the English cases *Barnes* v. *Addy* (3) In re *Barney* *Barney* v. *Barney* (4) *Mara* v. *Browne* (5) are all cases where the defendants had dealings with *trustees* and the *Cestuis que trustent* sued to make them liable. The defendants were not dealing with guardians. Now I do not think the legal position of a guardian is identical with that of a trustee. It may be readily conceded that, for several purposes, their positions are analo-

1. (1919) I L R 43 M 429 38 M L J 247. 2. A S No. 90 of 1921.
3. 9 Ch A 244. 4. (1892) 2 Ch 265.
5. (1896) 1 Ch 199.

F. B.

Suyamprakasam v. Murugesa Pillai

Ramesam, J.

gous (*vide* S. 88 of the Indian Trusts Act) and we may speak of guardians who hold a fiduciary position, loosely as trustees. I do not think the statement of Romilly, M. R., in *Mathew* v. *Brise* (6) amounts to more than this. In *Muthusubbia Chettiar* v. *Rangia Goundan* (7) it has been held that the powers of a guardian are less extensive than those of a trustee although the soundness of such a wide proposition has been doubted in *Vembu Iyer* v. *Srinivasa Iyengar* (8). The latter case suggests that the position of a guardian is in some respects wider than that of a trustee [*see* the judgment of Masilamani Pillai, J., in *Ramayya Chettiar* v. *Sappanimuthu Chettiar* (2)]. Whatever may be the position of guardians in English Law, it is impossible to bring a guardian under the definition of "trusts" and "trustee" in the Indian Trusts Act. If every guardian is a trustee, the legislature might have easily said so. The fundamental difference is that the legal estate vests in the trustee, but does not vest in the guardian. The *Cestuis que trust* if *sui juris* may require the trustee to convey the estate to him (S. 56 of the Trusts Act) but until this is done, the estate vests in the trustee. No such conveyance has to be executed by the guardian to his ward on his attaining majority.

There is no law prohibiting a guardian from entering into contracts on behalf of his ward. When such contracts are entered, they are not void. When they are not completely executed, the question of enforcing them against minors in Courts will be decided with reference to the test how far they are binding on the minors. In so far as such contracts impose a mere personal liability on the minor, they may not be enforced [*Waghela Rajsanji* v. *Shekh Maludin* (9), *Indur Chunder Singh* v. *Radha Kishore Ghose* (10).] and there may be difficulties in giving effect to them [*Ramajogayya* v. *Jaganadhan* (11)]. But these difficulties need not trouble a Court in cases where all that remains is something to be enforced on behalf of and for the benefit of the minor [*see* Masilamani Pillai, J.'s judgment in *Ramayya Chettiar* v. *Sappanimuthu Chettiar* (2)]. Mr. Sitarama Rao, the learned Vakil for

6. 14 Beav 345.
7. (1897) 7 M L J 191.
8. (1911) 23 M L J 638 at 641.
2. A S No. 90 of 1921.
9. (1887) I L R 11 B 551 (P C).
10. (1892) I L R 19 C 507 (P C).
11. (1918) I L R 42 M 185 : 36 M L J 29. (F. B.)

F. B.

Suyamprakasam v Murugesa Pillai

Ramesam J.

the respondent, suggested that in such a case the minor may sue on the principle that a general rule that only parties to a contract can sue does not apply where a benefit is reserved under or arises out of the contract in favour of a third person in such circumstances as to amount to a trust (*vide* Pollock on Contracts, 9th Edition, pages 222—223). This suggestion leads me to doubt the soundness of applying the English decisions to a case of a guardian. If the contract entered into by the guardian was made on behalf of the minor and the unexecuted part of it relates not to a liability but to a right of the minor, I do not see why the minor cannot sue on a contract of agency just as he can, on any other contract. Even Phillips, J., who differed from Masilamani Pillai, J. in *Ramayya Chettiar* v. *Sappanimuthu Chettiar* (2) does not seem to question such a proposition. On the terms of the power-of-attorney in that case, he held that the contract of agency in it was not created on behalf of the minor but personal to the principal.

Secondly, Lord Selbourne's judgment in *Barnes* v. *Addy* (3) indicates an exception to the main principle he was laying down :—" Unless those agents receive and become chargeable with some part of the trust property or unless they assist with a knowledge in a dishonest and fraudulent design on the part of the trustees " (at page 251). When we examine the facts in the English cases this aspect of the matter seems to become important. In *Barnes v. Addy* (3) the two solicitors (Mr. Duffield and Mr. Pearson) were sought to be made liable on the ground that Mr. Duffield prepared the deed of appointment of Barnes as sole trustee and the deed of indemnity and introduced Addy to a broker for the purpose of selling out some of the stock to pay some amounts to which the trust estate was liable and that Mr. Preston settled the deed of indemnity on behalf of Mrs. Barnes. These acts were alleged to amount to a fraud on the part of the solicitors. In *Barney* v. *Barney* (4), the widow of the testator acting as executrix decided to carry on the husband's business but this amounted to a breach of trust. Two friends assisted her by initialling all cheques issued by her on the bankers with whom the funds were invested, it being understood that the

2. A S No. 90 of 1921. 3. 9 Ch A 244. 4. (1892) 2 Ch 265.

cheques were not to be honoured without their initials. On this ground they were sought to be made liable. In *Mara* v. *Browne* (5) the defendants were acting solely as solicitors. North, J., held that Hugh Browne was "a principal in the matter and was not a mere agent for persons under whose lawful directions he was acting." The Court of Appeal reversed this judgment (Smith, L. J., being more guarded in his opinion on one point in the case).

In the first two cases, the defendants did not get possession of any part of the trust property. They were sought to be made responsible solely for their acts in advising and co-operating with the trustees. In the third case though Hugh Browne came into possession of the trust funds, he carried out the directions of the trustee. I am far from saying that an agent (of the guardian) lawfully entering into possession of the property under the directions of the guardian and carrying out all the directions of the guardian should be liable to the ward solely on the ground that the acts of the guardian were in excess of his powers and therefore the agent's entry is tortious. In such a case the agent ought not to be liable. But when the agent has not carried out the directions of the guardian and has not accounted for property that came into his possession, I do not see why, while those acts may give rise to an obligation *ex contracto*, there should not be also an obligation *ex delicto* making him liable to the ward if property is actually received. That the same act while giving rise to relations *ex contracto* between A and B may also give rise to relations *ex delicto* between B and C is a common conception known to law. In all such cases no doubt it is necessary for the protection of the defendant from a multiplicity of actions that the guardian also should be a party. In *Ramanathan Chettiar* v. *Muthiah Chetty* (1), and in *Ramayya Chettiar* v. *Sappanimuthu Chettiar* (2) the guardian was not a party and this fact was relied on as a ground of decision by Abdur Rahim, J., in the former case and Phillips, J., in the latter. Again I do not see why, in such a case, if the fact that the estate was that of a minor was known to the defendant, the minor's action should not be held to lie on the principle of the exception (I have stated already) to the rule that only the parties to a contract can sue. When property

1. (1919) I L R 43 M 429 38 M L J 247. 2. A S No. 90 of 1921.
5 (1896) 1 Ch 199.

F. B.

Suyamprakasam v. Murugesa Pillai

Ramesam, J.

is received for the purpose of being dealt with for the benefit of the ward and has not been accounted for to the guardian, I do not see why the facts do not amount to a trust in favour of the ward and the ward should not be entitled to sue. In the present case, though the frame of the suit is one for accounting, the allegations disclose that considerable items of property have come to the hands of the defendant. I do not know if that is the case in *Ramanathan Chettiar* v. *Muthiah Chetty* (1). But if it was alleged that some properties came to the hands of the defendants in that case, I doubt the correctness of that decision. It seems to me a large and dangerous extension of the English cases to apply them to cases of guardian's agents who have received properties and have not accounted for them even to the guardian. The position is so anomalous that it has only to be stated—a guardian deals with an agent on behalf of the minor's estate but cannot sue to enforce the agent's liabilities on the minor's behalf, but should sue in his own right though he has no rights *ex-hypothesi* and the minor cannot sue.

For all these reasons, I am inclined to doubt the correctness of the decision in *Ramanathan Chettiar* v. *Muthiah Chetty* (1). Even if it is not entirely erroneous it requires to be limited. I would therefore refer to a Full Bench the question whether a minor cannot maintain a suit against an agent appointed by the guardian for the benefit of the minor's estate (*a*) generally, and (*b*) at least in respect of properties received by the agent and not accounted for to the guardian.

Jackson, J. :—I agree.

S. Varadachari for appellant.

T. V Gopalaswami Mudaliar for respondent.

The Court recorded the following

Coutts Trotter, C. J

OPINION :—*The Chief Justice* :—The question referred to us is "whether a minor cannot maintain a suit against an agent appointed by the guardian for the benefit of the minor's estate (*a*) generally, and (*b*) at least in respect of properties received by the agent and not accounted for to the guardian."

The reference was really necessitated—I do not gather that the learned Judges had much doubt about the point themselves—by the decision of a Bench of this Court in *Ramanathan*

1. (1919) I L R 43 M 429 38 M L J 247.

F. B.

Suyamprakasam v. Murugesa Pillai

Coutts Trotter, C. J.

Chettiar v. *Muthiah Chetty* (1), which, in my opinion, applied itself to the wrong angle of view in looking at these matters. It is not a question of trustee *de-son-tort*; it is a question of a contract made by a minor with an agent to manage his property and a contract which no one can suggest is void though it may be voidable at the instance of the minor. It may be that the minor cannot be sued upon it; but here the minor is seeking to enforce his rights of property against a person who has undoubtedly had control of his estate and whom it is sought to make accountable for the estate and its funds which have passed into his hands. The English rule is perfectly clear; it has been clear, ever since the case of *Dormer* v. *Fortescue* (12) decided as early as 1744 by Lord Hardwicke, that in a position of this kind, the minor is entitled to call upon the agent to account.

I do not wish to say more, because my learned brother Ramesam in the Order of Reference has given his reasons for believing that *Ramanathan Chettiar* v. *Muthiah Chetty* (1) is wrongly decided and can no longer be regarded as good law, and I am entirely of the same opinion. I think that this reference must be answered in the affirmative as regards both (*a*) and (*b*).

Ramesam, J.—I agree.

Wallace, J.—I agree and have nothing to add.

T. S. V. *Reference answered in the affirmative.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

C. Doraivelu Mudaliar, Trustee and Dharmakartha of Apparswami Temple, Mylapore *Appellant** (*Plaintiff*)

v.

Natesa Gramani and others *Respondents* (*Defendants* 1, 5, 6 *and* 7).

F. B.

Doraivelu Mudaliar v Natesa Gramani.

Madras City Tenants' Protection Act (III of 1922), S. 9—Tenant in possession of temple land—Right to compel trustee to sell the land.

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*C C C Appeal No. 40 of 1922. th April, 1924.

12. 3 Atk 244.

1. (1919) I. L. R. 43 M. 429 : 38 M L J 247.

F. B.

Doraivelu Mudaliar v Natesa Gramani.

S. 9 of the Madras City Tenants' Protection Act applies to landlords who hold their land as trustees of a religious institution and a tenant in occupation of such land can enforce a compulsory sale of the land and require the trustees to deliver the land to him at a valuation to be made by the Court.

Parthasarathi Aiyangar v. Doraiswami Naicker, (1922) I L R 46 Mad 823 overruled.

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 475 of 1921.

This Appeal coming on for hearing on Monday, the 18th day of February 1924, and having stood over for consideration till Thursday, the 28th day of February, 1924, the Court (Phillips and Odgers, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Phillips, J.

Phillips, J. :—This is an appeal against an order under S. 9 of the Madras City Tenants' Protection Act, 1921, Act III of 1922, by which the tenant in this suit has been allowed to purchase the land on which he has built a superstructure at a price fixed by the Court.

There are a large number of connected suits and the question at issue is one that involves the rights of a large number of tenants in Madras City, *i. e.*, whether Act III of 1922 applies to temple trustees who are landlords of land in the City of Madras. The appellant is the trustee of the Apparswami temple and in the appeal he has raised certain minor pleas which have no great force. In the first place, it is pleaded that the agreement to purchase the land at a price to be fixed by the Court was made before the Act had come into force and that the agreement was not an agreement to abide by the terms of the Act but was only an agreement to have a commissioner appointed for valuing the land. It is clear, however, that the agreement was really more than a mere agreement to have the land valued, for unless the landlord had agreed to accept the provisions of S. 9 of the Act, no purpose could have been served by having the land valued. It is clear that he did consent to the particular procedure being adopted and he is now bound by that agreement unless it is void for other reasons. There is also no force in the contention that a written application should have been presented under S. 9. The Act does not specifically provide for a written application, nor have we any proof that no such written application was filed.

The main point on which the appellant relies is the plea that the Act does not apply to trustees of temples and in this he is supported by the judgment in *Parthasarathi Aiyangar* v. *Doraiswami Naicker* (1), which clearly is in his favour. I have had the advantage of reading my learned brother's judgment and with all respect I think with him that that decision is open to question. It is a matter of some importance, for this Act was passed " for the protection of tenants in Madras who had constructed buildings on others' lands in the hope that they would not be evicted so long as they paid a fair rent for the land, " and we are given to understand that, if the ruling in *Parthasarathi Aiyangar* v. *Doraiswami Naicker* (1) is correct, a very large number of tenants who hold under temple trustees will be deprived of the benefits of the Act ; and unless it is necessary to hold that an Act which was expressly designed for their benefit has failed in securing its object, I would be inclined to hold otherwise, notwithstanding that an opinion has been expressed to the contrary. I, therefore, agree that the question ought to be referred for the decision of a Full Bench. The arguments of Spencer and Venkatasubba Rao, JJ., proceed mainly on an interpretation of the explanation to S. 9 which runs as follows :—" ' Land ' means the interest of the landlord in the land and all other interests which he can convey under any power ; " and they have come to the conclusion that a trustee has no power to convey the land except for the benefit of the institution or for necessity. With all respect, it appears to me that this explanation cannot bear this interpretation. The explanation relates to the word " land " as used in S. 9 alone, because in S. 2 (2) there is another definition of " land. " In S. 9 we find the following sentences containing the word " land " :—" the landlord shall be directed to sell the land for a price to be fixed by the Court " :—" the Court shall fix the price of the land " :—" on payment of the price the Court shall pass a final order directing the conveyance of the land by the landlord." In all these instances, the word " land " is used with reference to what is to be sold to the tenant and conveyed by the landlord, and, in my opinion, the explanation is inserted to provide that the whole of the interest of the landlord shall be conveyed to the tenant, not merely his own interest but any other interest which

1. (1922) I L R 46 M 823 44 M L J 91.

he can convey under any power. For instance, the interest of the manager of an undivided Hindu family extends only to his own share in the property, but under the Hindu Law he has the disposing power over the shares of the other members. Or, again, a landlord who had not an absolute estate might by means of a power of attorney or other deed so empowering him have the right to convey further interests in the land. If that is so, I think that it would be difficult to justify the arguments in the reported case. The power of a temple trustee to alienate temple property is undoubtedly limited, but it is well recognised that, under certain circumstances and for certain purposes, he can alienate the land, one of those purposes being necessity. When, therefore, the legislature has determined in the interests of the State that a landlord may be compelled to sell his land to a long-standing tenant in order to avoid gross injustice to that tenant, it is difficult to see how this direction does not impose a necessity on a trustee, who is also a landlord, to alienate the land. It can hardly be said, nor do I think that it would be contended, that the Act is *ultra vires* of the legislature and, if it is not *ultra vires,* the legislature has imposed this necessity on temple trustees. It is not as if this was only instance in which the legislature had compelled trustees to alienate trust property. Under the Land Acquisition Act, such land can be acquired by Government on payment of the proper compensation. There are clauses in that Act which to a certain extent safeguard the interests of the trust by providing that the compensation money shall be invested for the trust ; but the mere fact that the present Act has failed to provide a similar procedure, *viz.*, a procedure whereby the possibility of criminal misappropriation by the trustee will be lessened, cannot be taken as conclusively showing that the Act was not meant to apply to temple trustees. There is really no reason to presume that, when a temple trustee obtains possession of cash in lieu of land, he will at once proceed to misappropriate it ; he can spend it on the purposes of the trust, or he can invest it so as to secure the income from the fund for the benefit of the trust and I fail to see how any argument that this Act III of 1922 does not apply to temple trustees can be supported by the analogy of the Land Acquisition Act. The Judges of the former Bench were both agreed that temple trustees come within the definition of "landlord" in S. 2 (3) of the Act and with that opinion I respectfully agree ; but

neither my learned brother nor I agree with the further conclusion that the Act is not applicable to temple trustees.

I think that it is necessary that the following question should be determined by a Full Bench ; and in view of the fact that a number of cases are pending in which this question is at issue, I respectfully urge that the matter be considered at an early date. The question is, " Does the Madras Act III of 1922 apply to landlords who hold their land as trustees of a religious institution ? "

Odgers, J.

Odgers, J. :—The suit from which this appeal arises was in ejectment by the trustee of the Apparswami Temple, Mylapore, against a tenant who had erected a superstructure on the temple land. The suit was brought, we are informed, while the bill which became the Madras City Tenants' Protection Act (Act III of 1922) was under discussion in the Legislative Council. The bill was passed and while the Governor's assent to it was awaited, the City Civil Court Judge entertained an application by the tenants—(there were many suits of which this is one)—to proceed under the Act to enable the tenants to acquire their holdings from their landlord, the trustee of the temple. Commissioners were appointed by consent of all parties and on their report the City Civil Judge made his award, after the bill had become law. The trustee had previously in C. S. No. 194 of 1921 been authorised by the Original Side of this Court to sell certain lands including those in question at certain prices. The prices awarded by the City Civil Judge are somewhat lower than those fixed by the Original Side. In appeal the point is taken that the Act does not apply to a trustee of a religious endowment at all. Reliance is placed on the decision of Spencer and Venkatasubba Rao, JJ., in *Parthasarathi Aiyangar* v. *Doraiswami Naicker* (1). That was a reference by a different Judge of the City Civil Court to the High Court and the question referred was " whether a tenant in occupation of trust lands belonging to a temple or mosque can enforce a compulsory sale under S. 9 of the Madras City Tenants' Protection Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court. " Both the learned Judges held that the trustees of religious endowments fell within the definition of landlord in S. 2 (3) of the Act ; but the difficulty they felt was in constru-

1. (1922) I L R 46 M 823 44 M L J 91.

F. B.

Doraivelu Mudaliar v. Natesa Gramani.

Odgers, J.

ing the explanation to S. 9. It runs as follows :—" 'Land' means the interest of the landlord in the land and all other interests which he can convey under any power." They were of opinion that the words "under any power" must be applied to the limited power of a trustee of temple property to alienate, *e. g.*, only for necessity or for the benefit of the institution. The learned Judges set out to inquire as to the interests which such a trustee can convey under any power, *i. e.*, to examine the case-law in support of their hypothesis that the power of alienation is limited. With great deference I think they were wrong.

The explanation is as to what is meant by the expression "land" in S. 9 only. The word occurs in the first sub-section twice "the landlord shall be directed to sell the land" and "the Court shall fix the price according to the market value of the land." In sub-S. 3 it occurs once : "The Court shall pass a final order directing the conveyance of the land." The explanation then follows. As I read it the meaning of the explanation is that the landlord thus conveys not only his own interests in the land but any other interests which he has power to convey. Power is used in its legal sense as in "power of attorney," "power of sale," "power of appointment." The landlord in other words is to convey every kind of right or interest he has in the property whether in his own right or by rights conferred upon him. It therefore seems to me that a discussion as to the limited rights of alienation by trustees is wholly inapplicable to the wording of this explanation. Further in default of any express words or implication to the contrary in a settlement or trust deed, a trustee will take the whole legal estate and I have no doubt that in this case the legal estate is in the trustee of the temple. I have already said that it was held in *Parthasarathi Aiyangar* v. *Doraiswami Naicker* (1) that a trustee falls within S. 2 (3) and with that opinion I respectfully agree. It seems to me therefore with great respect that to hold that a tenant under a temple or other religious endowment cannot enforce a sale of land to him under S. 9 of Act III of 1922 is wrong and I agree that in this difference of opinion the question should be referred to a Full Bench and I also agree as to the terms of the reference as set out by my learned brother.

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1. (1922) I L R 46 M 823 44 M L J 91.

This Appeal came on for hearing before the Full Bench as constituted above.

V. Sivaprakasa Mudaliar and *C. V. Mahadeva Aiyar* for appellants.

N. Chandrasekhara Aiyar for *K. B. Ranganatha Aiyar* for 1st respondent.

The other respondents did not appear either in person or by pleader.

The Court expressed the following

OPINION :—*The Chief Justice* :—This is a reference made by Phillips and Odgers, JJ., obviously because they were not satisfied with the correctness of the decision of another Bench of this Court consisting of Spencer and Venkatasubba Rao, JJ., in *Parthasarathi Aiyangar* v. *Doraiswami Naicker* (1).

The short point referred to us is, Does the Madras Act III of 1922 apply to landlords who hold their land as trustees of a religious institution ? The wording of the reference is not very definite, because it is conceded on all hands that the term "landlord" as defined in the Act must cover persons who are landlords by virtue of their capacity as trustees of trust lands with power to let them to tenants. The real point is as to whether the provisions of S. 9 of the Madras Act III of 1922 apply to landlords who are trust landlords by virtue of being trustees of religious or charitable institutions.

The Act is a very unhappily drafted one and it is quite clear to us that any reasonable draftsman must have foreseen that a question such as the one we have now to determine was certain to arise and should have provided for it. However, he has not done so here in express terms and it remains to be seen whether, on the one hand, he has done so by necessary implication or on the other hand there are considerations outside the Act which compel us to say that it does not apply to landlords in the position of trustees.

The preamble to the Act is this :—" Whereas it is necessary to give protection to tenants who in many parts of the City of Madras have constructed buildings on others' lands

1. (1922) I L R 46 M 823 44 M L J 91.

F. B

Doraivelu Mudaliar *v.* Natesa Gramani.

Coutts Trotter, C. J.

in the hope that they would not be evicted so long as they pay a fair rent for the land. It is hereby enacted as follows." Then follows the body of the Act. In S. 2, sub-s. (3), occurs the following definition of "Landlord":— Landlord' means any person owning any land and includes every person entitled to collect the rent of the whole or any portion of the land, whether on his own account or on behalf of or for the benefit of any other person. (I am only reading the material words). Then by S. 3, it is enacted that every tenant shall on ejectment be entitled to be paid as compensation the value of any building, which may have been erected by him, by any of his predecessors-in-interest or by any person not in occupation at the time of the ejectment who derived title from either of them and for which compensation has not already been paid; and that a tenant who is entitled to compensation for the value of any building shall also be paid the value of trees which may have been planted by him on the land. To pause for a moment. It seems difficult to suppose that the Act could possibly have meant to exclude from the scope of this section a tenant who holds under a trustee or trustees of a trust or charitable endowment. The tenant has put up his building on somebody else's land and that somebody else on ejecting him is going to get the benefit of the tenant's work, and it is enacted in perfectly general language that in such cases the tenant shall have the benefit of his labour in the form of money compensation. It is said in this case that a landlord who is a trustee cannot deal with the trust lands unless it be for the benefit of the trust or for purposes necessary to the trust or endowment. Exactly the same line of reasoning would apply to the compensation provided for by S. 3. It is of no benefit to the trust to pay out part of the trust funds whether income or capital, by way of compensation to eject a tenant, but it is a mere act of justice required to be done by the policy of the Act. Now I pass on to the section which is really material in this case, S. 9. Sub-S. (1) of that section begins thus:—"Any tenant who is entitled to compensation under S. 3 and against whom a suit in ejectment has been instituted, and then provision is made in it that such a tenant shall have power to apply to the Court for an order for the sale of the land on conditions approved by the Court with the object of putting him in the position of a purchaser of his holding." The words are "Any tenant who is entitled to compensation

F. B.

Doraivelu Mudaliar v. Natesa Gramani.

Coutts Trotter, C. J.

under S. 3. *Prima facie* that would include all tenants who have put up buildings on their landlords' land, whether those landlords are owners of the land or trustees of it. It is said that it is not so, because of the explanation appended to that section. I have always noticed in Indian statutes that, when any doubt is raised as to the construction of a section of an Act, it is usually raised by what is somewhat disappointingly called the explanation. . So here, the explanation is, " 'Land' means the interest of the landlord in the land and all other interests which he can convey under any power. " It is said that this landlord, being a trustee for a charitable or religious endowment, has no interest of his own to convey and can only convey the trust property or the trust land under conditions defined by the Hindu Law which I may summarise as being practically equivalent to a necessity arising out of the circumstances and the position of the trust at the moment ; and it is on that ground that the decision in *Parthasarathi Aiyangar* v. *Doraiswami Naicker* (1) proceeded. But it seems to me that it is wrong to seek to control a statute, which is obviously intended to overrule the ordinary law, by general considerations imported from the Hindu Law or what is called the common law of India. A trustee landlord can convey the interest of the trust in certain given circumstances. Two of those circumstances have been already referred to,—necessity and benefit for the trust,—and I think there is added a further one by this new Act III of 1922, namely, when a tenant has been in possession of the land and has put up a superstructure on the land and to eject whom would be in certain circumstances plainly inequitable without compensation, and in other circumstances, such as the one contemplated by the section would be inequitable without giving him an opportunity of acquiring the land for himself on payment. That consideration appears to dispose of this case.

We cannot accede to the contrary opinion of Spencer and Venkatasubba Rao, JJ., in *Parthasarathi Aiyangar* v. *Doraiswami Naicker* (1) and must answer the reference, not in the form of a direct answer to the question put but by saying that in our opinion, S. 9 of the Madras Act III of 1922 applies to landlords who hold their land as trustees of a religious institution.

1. (1922) I L R 46 M 823 : 44 M L J 91.

F. B.

Doraivelu Mudaliar v. Natesa Gramani.

Ramesam, J.

Ramesam, J.—I agree.

I think that the matter can also be put in a different way. Both in the case before us and in the case in *Parthasarathi Aiyangar* v. *Doraiswami Naicker* (1) the plaintiffs were really the idols in the temple and their Lordships of the Judicial Committee remarked in *Vidya Varuthi* v. *Balusami Aiyar* (2), that, under the Hindu Law, the image of a deity of the Hindu Pantheon is, as has been aptly called, "a juristic entity" vested with the capacity of receiving gifts and holding property. The landlord of the suit land is undoubtedly the idol of the temple within the definition of the term "landlord" in S. 2, sub-section (3). That being so, there is no difficulty in applying the explanation to S. 9 to the suit land. The explanation to S. 9 consists of two parts. The first part refers to the interest of the landlord in the land, and the second to all other interests which he can convey under any power. The object of second clause is to add to the first clause and not to cut it down. If any land falls under the explanation of the term as given in the first clause, one need not go to the second clause. In this case the suit land is the land belonging to the landlord, that is the idol in the temple represented by the trustee.

I agree with the answer proposed by my Lord.

Wallace, J.

Wallace, J.—I fully agree with all that has been said by the learned Chief Justice, and I should just like to put my view in another form. If we take the procedure which is laid down in S. 9, we find that any tenant, *i. e.*, by definition "any tenant of land, liable to pay rent on it" not excluding a tenant of land owned by a trust, is entitled to move the Court for an order that his landlord shall be directed to sell the land. It is admitted that the trustee of trust lands comes within the definition of the term "landlord." When the Court has made that order and not earlier, as I conceive it, can a trustee landlord come in to object that such an order cannot be valid because he is not entitled in law to sell the land or to alienate it permanently except for necessity. To that the Court rejoins that the order itself has just provided the necessity required and it seems to me that on that the objection of the trustee landlord must vanish, as it cannot be argued that such an order of the Court directing him to sell the land is not a necessity justifying his conveyance of

1. (1922) I L R 46 M 823 : 44 M L J 91.
2. (1921) I L R 44 M 831 : 41 M L J 346 (P C).

the land. In this view there seems to me nothing in the Act from which one may reasonably conclude that it was not intended to apply to a trustee landlord.

A. V. V. *Reference answered.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER, MR. JUSTICE KRISHNAN AND MR. JUSTICE RAMESAM.

Theethumalai Goundar and others, *In re* *Appellants**
(*Prisoners* 1, 4, 6, 7, 12, 13, 15, 16 *and* 18).

Penal Code, Ss. 326 *and* 149—*Charge under—Conviction under S.* 326 *alone—Illegality—Irregularity coming under S.* 537, *Cr. P. Code—S.* 149, *I. P. Code—Object of—If creates an offence—Conviction under section without a charge—Illegality—Irregularity—Ss.* 148 *and* 326—*Rioting—Conviction for—Legality—Injunction restraining accused from interfering with complainant's possession—Entering upon land in disobedience of—Remonstrance by complainant—Attack by accused and injuries caused thereby—Conviction in case of.*

Held, by the Full Bench : When a charge has been framed under Ss. 326 and 149, I. P. Code, a conviction under S. 326, I. P. Code is not necessarily bad. Whether the conviction is bad or not depends upon whether the accused has or has not been materially prejudiced by the form of the charge.

S. 149, I. P. Code, creates no offence, but is like S. 34 merely declaratory of a principle of the Common Law, and its object is to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand which inflicted the grievous hurt. A person cannot be tried and sentenced under S. 149, I. P. Code, alone. The omission of S. 149 from a charge does not create an illegality by reason of S. 233, Cr. P. Code. It is only an irregularity coming under S. 537, Cr. P. Code.

Held, by the Division Bench When in disobedience of an order of the Civil Court restraining them from interfering with the possession of P. W. 6, the accused entered upon the land in his possession and began cutting the crop, and attacked and caused injuries to P. W. 6 and others who remonstrated with them and did nothing else beyond remonstrating, *held,* that the use of force towards those persons in prosecution of the common object of retaining the land which was in itself an unlawful object, undoubtedly constituted the accused into an unlawful assembly guilty of rioting.

Appeal against the Order of the Court of Sessions of the Tinnevelly Division in Case No. 55 of the Calendar for 1923.

V. L. Ethiraj and *T. Krishnan Nambisan* for appellants.

The Public Prosecutor on behalf of the Crown.

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*Crl. Appeal No. 1045 of 1923. 24th April, 1924.

F. B.

Theethumalai Goundar, *In re.*

The Court (Phillips and Odgers, JJ.) dismissing the Appeal so far as accused 4, 7, 12, 13, 15, 16 and 18 are concerned made as regards accused 1 and 6 the following

ORDER OF REFERENCE TO A FULL BENCH :—

Phillips, J.

Phillips, J. :—In this case the appellants who were accused 1, 4, 6, 7, 12, 13, 15, 16 and 18 were charged under Ss. 148, 326 and 302, I. P. Code, read with S. 149, I. P. Code. Accused 4, 7, 12, 13, 15, 16 and 18 were found guilty of rioting under S. 147, and accused 1 and 6 were found guilty under Ss. 148 and 326, I. P. Code.

It appears that there was a dispute between the accused party and the party of P. W. 6 about some land. P. W. 6 has filed suits with reference to this land and obtained an injunction restraining the persons under whom the accused claim from interfering with his enjoyment of the land. The prosecution case is that when some of P. W. 6's men were watching the land, the accused came and began harvesting the crop. P. W. 6 and others then went and remonstrated and apparently beyond remonstrating did nothing else before they were attacked by the accused. The 1st accused broke the arm of P. W. 7 and the 6th accused injured one Mappillaiswami Naick, who subsequently died of his injuries. These facts are not disputed in Appeal but the conviction is questioned on grounds of law.

So far as the conviction of the seven accused under S. 147 is concerned, it is urged that the Sessions Judge has not found that P. W. 6 was in possession of the land and that, consequently, there is no finding to justify the conviction for rioting, but it appears that there had been an order enjoining the accused not to interfere with the possession of P. W. 6. When, therefore, they entered upon the land and began cutting the crop, they were doing an unlawful act in contravention of the orders of the Civil Court. It is possible that, if the prosecution witnesses had then attacked them, they would have been entitled to defend themselves and that injuries caused by them might be so justified ; but the prosecution witnesses merely remonstrated with them, which they were perfectly entitled to do, and, consequently, the use of force towards these witnesses in prosecution of the common object of retaining the land which was in itself an unlawful object, undoubtedly constituted them into an unlawful assembly guilty

of rioting. So far as these accused are concerned, their convictions are right and must be confirmed and the Appeal dismissed.

Accused 1 and 6 have been convicted under Ss. 148 and 326,I. P. Code, and, while it is not disputed that the convictions under S. 148 are correct, it is argued that the convictions under S. 326 cannot stand, because the charge against them was under S. 326 read with S. 149, and that, therefore, the convictions under S. 326 alone are bad. This is undoubtedly the view of the Calcutta High Court which has always treated the so-called offence under S. 149 as distinct from the substantive offence and I may refer to *Abhi Misser* v. *Lachmi Narain* (1), *Panchu Das* v. *Emperor* (2), *Emperor* v. *Madan Mandal* (3) and *Reazuddi* v. *The King-Emperor* (4). In all these cases it was held that, when the charge had been made under S. 325 read with S. 149, there could be no conviction under S. 325 alone, the two being distinct offences which must be charged separately. As a matter of fact, in each of these cases it was found that no rioting took place and, consequently, no conviction could possibly be had by reason of S. 149, for that necessarily implies a riot ; but apart from this, those cases are certainly authority for Mr. Ethiraj's contention that the present conviction of accused 1 and 6 under S. 326 is wrong. There would appear to be no reported cases of this Court, until one reported very recently in *Thaikkottathil Kunheen, In re* (5), and apparently the Judges in that case do treat the two offences as distinct ; but although Wallace, J., in his judgment says that S. 233, Cr. P. Code, which prescribes that there should be a separate charge for each distinct offence, was not followed, yet he does not hold that that in itself vitiates the conviction, for he treats it as a defect which may or may not occasion a failure of justice and, no doubt, in the case which he was considering, the omission of S. 149, which was the question under consideration then, was likely to prejudice the accused and, on that ground, the conviction was set aside. Similarly Ramesam, J., seems to consider the offence under S. 149 as a separate offence, but does not definitely deal with the point and also relies on the omission of S. 149 as being a serious

1. (1900) I L R 27 C 566.
2. (1907) I L R 34 C 698.
3. (1913) I L R 41 C 662.
4. (1912) 16 C W N 1077.
5. (1923) 18 L W 946.

B

Theethumalai Goundar, *In re.*

Phillips, J.

defect prejudicial to the accused. This decision was considered by this same Bench in a very recent case, Cr. Appeal No. 1364 of 1922, in which we held that, where the charge was sufficiently clear, the mere omission of S. 149 from the charge was not sufficient to vitiate the conviction for the substantive offence. With all respect to the learned Judges of the Calcutta High Court, I find it difficult to understand how an offence is created under S. 149. That section reads as follows "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence is a member of the same assembly, is guilty of that offence." That is to say, it does not define any particular offence but says that, if a particular offence is committed by any member of an unlawful assembly, other members of that assembly are guilty of the same offence if certain conditions laid down in the section are complied with; for instance, if grievous hurt is committed by one member under certain conditions, the other members of the unlawful assembly are also guilty of grievous hurt. The offence is grievous hurt and whether it is charged under S. 325 or under Ss. 325 and 149, the offence is the same and the punishment provided is the same. S. 149 merely provides that certain circumstances short of the actual commission of grievous hurt are sufficient to prove that a person is guilty of that offence. If the charge gives notice to the accused that the provisions of S. 149 will be taken into account—and it must be presumed that he knows those provisions, as every one is deemed to know the law—then the mere omission of the number of the section would not prejudice him, and, in my opinion, would not entitle him to an acquittal. This case, however, is the converse of that and it is urged that none of the accused have been charged with the offence under S. 326, because they have only been charged under Ss. 326 and 149, but to admit this would be to admit that they are two separate offences, one under S. 326 and one under Ss. 326 and 149; but, as I have pointed out above, this does not seem to be so. It is possible that by framing a charge under S. 149, the accused persons might be prejudiced if, for instance, the actual offence under S. 326 was said to have been committed by some one not under trial, in which case the attention of the accused would be

directed to showing either that they were not members of the unlawful assembly, or that this person who committed the offence was not a member of that assembly ; but in a case like the present where 18 persons are accused and each one is charged with the offence under S. 326—and it is the prosecution case, which is known to the accused, that the offence under S. 326 was committed by one or more among the accused charged—it does not seem to me to prejudice the accuesd in any way in their defence. Their defence must always be either that there was no unlawful assembly, or that the offence of grievous hurt was not committed ; and, if it is proved that it was committed by one or more accused, whether the conviction is under S. 326 alone or under S. 326 by reason of the provisions of S. 149, seems to me immaterial ; but as the view of the Calcutta High Court has some support in the case reported in *Thaikkottathil Kunheen, In re* (5), I think it is advisable that the following questions should be referred to a Full Bench (1) "When a charge omits S. 149, I. P. Code, and the conviction is based upon the provisions of that section, is that conviction necessarily bad, or does it depend on whether the accused has or has not been materially prejudiced by the omission ? (2) When a charge has been framed under Ss. 326 and 149, I. P. Code, is a conviction under S. 326, I. P. Code, necessarily bad, or does this also depend on whether the accused has or has not been materially prejudiced by the form of the charge ?

Odgers, J

Odgers, J.—In this case 18 accused were originally charged and accused Nos. 2, 3, 5, 8, 9, 10, 11, 14 and 17 were acquitted. Of the remaining nine all but two were convicted of rioting under S. 147. Accused 1 and 6 were found guilty of rioting armed with deadly weapons and voluntarily causing grievous hurt with deadly weapons under Ss. 148 and 326. There has practically been no argument on the merits and this can be disposed of very shortly.

The accused were found to belong to a party which went to harvest a certain field, the title to which has been a matter of dispute, and the occurrence in question took place when the accused went on the 14th February, 1923 to harvest the cholam crop growing thereon. Prosecution witnesses 6 to 11

5. (1923) 18 L W 946.

F.B.

Theethumalai Goundar, *In re.*

Odgers, J.

received injuries. One Mappillaiswami Naick received an injury to his arm from which he died on the 23rd February and Ramasawmi Naick, P. W. 7, also sustained injuries necessitating amputation of his arm. It appears that in September 1922 injunctions were obtained against the 6th accused and 3rd accused and certain women who claimed a portion of the land in dispute. The injunction petition was posted for hearing on the 15th February and it was the day before that the occurrence in question took place.

It is suggested that the evidence of P. W.s 6 to 12 is all interested, but I find no reason to question the conclusion come to by the learned Sessions Judge on the facts. It may be, as the learned Judge remarks, that the issue of the injunction would not confer possession, but the accused have to justify the infliction of grievous hurt which resulted in the death in defence of their possession and this they have failed to do. The convictions under S. 147 are clearly correct and need no further examination.

The interest however in this appeal centres round the legal point raised by Mr. Ethiraj on behalf of the accused 1 and 6 who were, as stated, convicted under Ss. 148 and 326. Mr. Ethiraj contends that this is illegal, because the charge was under Ss. 148, 326 read with S. 149, I. P. Code, and it is contended that a charge under S. 326 made applicable by reason of S. 149 will not sustain a conviction under S. 326 simpliciter. In the first place I am not convinced that the charge is necessarily only S. 326 and *plus* S. 149. It runs " armed yourself with deadly weapons and committed rioting (that is S. 148) and caused grievous hurt by dangerous weapons (that is S. 326) and you did commit murder by intentionally causing the death of, etc., (that is S. 302) and thereby committed offences punishable under Ss. 148, 326 and 302 of the Indian Penal Code read with S. 149, I. P. Code. " The question largely turns on whether or not S. 149 constitutes a distinct offence or not. It has been laid down in *Queen-Empress* v. *Bisheshar* (6) that S. 149 creates no offence but is merely declaratory of a principle of the common law which has for a long time prevailed in England, and that the object of the section is to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand that caused the hurt committed

6. (1887) I L R 9 All. 645.

F.B.

Theethumalai Gundar, In re.

Odgers, J.

in prosecution of the common object. In that case the appellants were convicted under S. 147 of rioting, and under S. 325 of voluntarily causing grievous hurt. It is noticeable that in this and other earlier cases, S. 149 does not seem to have been specifically charged. The appellants in the Allahabad case were sentenced separately for their convictions under S. 147 and S. 325. It was held that these sentences were legal. In *Queen-Empress* v. *Bana Punja* (7), a Full Bench of the Bombay High Court held that it was legal to pass two sentences, one for rioting and the other for hurt, where a person is convicted of rioting and hurt and the conviction for hurt depends on the application of S. 149. There again the charges were under Ss. 147, 148 and 326 without any reference to S. 149. To turn to the Calcutta cases in *Abhi Misser* v. *Lachmi Narain* (1), it was held that the accused could not be properly convicted under S. 325 by the application of S. 149, where it has not been found that these persons or any of them were members of an unlawful assembly. This would seem perfectly obvious in the case of persons who have been acquitted of rioting. Therefore it seems to me to have no bearing on the present case. In *Panchu Das* v. *Emperor* (2), it was held that the conviction under S. 325 was illegal on the ground that no such charge was ever framed, and that the accused had not been called upon to meet such a charge. The appellants there were tried under Ss. 147, 304, 325 and 323 read with S. 149, and they were convicted under S. 325 alone, and the learned Judges add, " If the evidence showed that the accused or any of them inflicted hurt or grievous hurt with their own hands. . . additional counts of charge for those offences should have been added in the Sessions Court. " They also held that the offence of causing grievous hurt is not minor to, or included in, a charge under S. 325 read with S. 149. In *Emperor* v. *Madan Mandal* (3) the accused were charged under Ss. 148, 304 read with S. 109, and S. 326 read with S. 149. The jury found them guilty under S. 326 simpliciter. The jury returned a verdict of acquittal under S. 148 apparently owing to the admitted misdirection of the learned Judge. It was held that the verdict of the jury convicting the accused under S. 326 was practically a judgment of acquittal inasmuch as there was no

7. (1892) I L R 17 B. 260.

1. (1900) I L R 27 C 566.

2. (1907) I L R 34 C 698 at p 703.

3. (1913) I L R 41 C 662.

F.B.

Theethumalai Goundar, *In re.*

Odgers, J.

charge under that section independently. In this the case in *Reazuddi* v. *The King-Emperor* (4) was followed where the result of the Calcutta rulings is summed up as the learned Judges say, "It is now settled law that when a person is charged by implication under S. 149, he cannot be convicted of the substantive offence." If this statement of the law is to be accepted as correct, and if I am wrong in my suggestion that the charge here as framed does not charge S. 326 simpliciter, it follows that the convictions under consideration are illegal. With deference I think the Calcutta decisions are wrong in that they erect S. 149 into a distinct offence thus directly refusing the view set out in *Queen-Empress* v. *Bisheshar* (6).

My learned brother and myself dealt with this point, though not exhaustively, in Criminal Appeal No. 1364 of 1922. There for reasons given we held that the accused could not be prejudiced by the omission to name S. 149, the charge having been set out *in extenso*. We had however to consider the only Madras case, as far as I can discover, on the point, viz., *Thaikkottathil Kunheen, In re* (5), decided by Ramesam and Wallace, JJ. There the petitioners were convicted under S. 143, I. P. C., and S. 126 of the Railways Act. It was contended that the convictions were correct if considered as under S. 126 of the Railways Act read with S. 149, I. P. Code. The latter section was neither charged nor referred to in the lower Court and on that ground, following the decision of Oldfield and Devadoss, JJ., Ramesam, J. held the conviction under S. 126, Railways Act, bad, as having prejudiced the accused.

Wallace, J., though holding that S. 149 does not create in itself any offence, held it was essential that the accused should have had notice that what they had to meet was a charge that they were members of an unlawful assembly which in prosecution of its common object committed an offence under S. 126, Railways Act. The learned Judge speaks of the "substantive offence" [as do the learned Judges of the Calcutta Court in *Reazuddi* v. *The King-Emperor* (4)] in contradistinction to S. 149—which lays down that every member of an unlawful assembly may if *an offence* is committed under certain circumstances be guilty of *that* offence.

4. (1912) 16 C. W N 1077 5. (1923) 18 L W 946.

6. (1887) I L R 9 A 645.

Wallace, J., therefore held that S. 233, Cr. P. Code, had not been complied with and that the accused had been prejudiced thereby. He added that if S. 149, I. P. Code, is relied on it should be stated and named in the charge.

I have had the advantage of reading the judgment just delivered by my learned brother and I share his views for doubting if in a case like the present there could be any real prejudice to the accused, assuming he has here been charged under Ss. 326 and 149 and not also under S. 326 simpliciter.

For the reasons stated by him I also think an authoritative ruling on this point is very desirable. It has arisen at least three times within the last eight months and apparently twice before that, viz., in Referred Trial No. 85 of 1922 and Criminal Revision Case No. 662 of 1921. There may also be other instances which have not been brought to my notice. I agree to the terms of reference proposed by my learned brother.

This Appeal came on for hearing on Tuesday, the 22nd day of April, 1924.

V. L. Ethiraj and *T Krishnan Nambisan* for appellants.

The Public Prosecutor on behalf of the Crown.

The Court expressed the following

OPINION :—*Spencer, J.* :—The questions referred to us are (1) When a charge omits S. 149, I. P. Code, and the conviction is based on the provisions of that section, is that conviction necessarily bad, or does it depend on whether the accused has or has not been materially prejudiced by the omission ? (2) When a charge has been framed under Ss. 326 and 149, I. P. Code, is a conviction under S. 326, I. P. Code, necessarily bad, or does this also depend on whether the accused has or has not been materially prejudiced by the form of the charge ?

The charge in the present case runs as follows :—" That you on or about the 14th February, 1923 at 2 p. m. at Sekkarakudi with a view to enforce the right to the punjai land S. No. 1162 of Sekkarakudi village, armed yourselves with deadly weapons and committed rioting and caused grievous hurt by dangerous

F.B.

Theethumalai Goundar, *In re.*

Spencer, J.

weapons, and that you did commit murder by intentionally causing the death of Subramania Mappilaiswami Naick and thereby committed offences punishable under Ss. 148, 326 and 302 of the Indian Penal Code, with S. 149, I. P. Code, and within the cognizance of the Court of Sessions of Tinnevelly Division, and I hereby direct that you be tried by the said Court on the said charge."

It is clear that the charge in this case does not omit S. 149 and thus the first question referred to us does not directly arise on the facts.

We agree with the statement of Edge, Chief Justice in *Queen-Empress* v. *Bisheshar* (6), that S. 149 creates no offence, but is like S. 34, merely declaratory of a principle of the common law, and its object is to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand which inflicted the grievous hurt. We do not think that Schwabe, Chief Justice, intended to lay down any contrary principle in C. R. C. No. 662 of 1921. S. 40, Indian Penal Code, defines " offence " as a thing made punishable under the Code or under any special or local law, as defined in the Code. A person could not be tried and sentenced under S. 149 alone, as no punishment is provided by the section. Therefore the omission of S. 149 from a charge does not create an illegality by reason of S. 233, Criminal Procedure Code, which provides that for every distinct offence of which any person is accused there shall be a separate charge.

To answer the first parts of both the questions referred to us in the affirmative would be to overlook S. 537, Criminal Procedure Code, which deals with omissions from charges.

The learned Judges who decided *Reazuddi* v. *The King-Emperor* (4) and *Emperor* v. *Madan Mandal* (3) do not appear to have considered the effect of S. 537 upon omissions from the charge. In *Sita Ahir* v. *Emperor* (8) it was considered when a charge for a substantive offence under S. 323 was omitted. We do not agree with the general statement in the first of these decisions that it is " now settled law that when a person is charged by implication under S. 149, he cannot be convicted of the substantive offence." We think that when a

6. (1887) I L R 9 A 645 at 649. 4. (1912) 16 C W N 1077.
3. (1913) I L R 41 C 662. 8. (1912) I L R 40 C 168.

F.B.

Theethumalai Goundar, In re.

Spencer, J

person is charged with being a member of an unlawful assembly, one of the members of which caused grievous hurt in pursuance of the common object, there is no necessary implication that that particular member is not himself. *Emperor* v. *Madan Mandal* (3) was a clear case of misdirection to a jury which came before the High Court in consequence of a reference under S. 307, Criminal Procedure Code. *Panchu Das* v. *Emperor* (2) was another case of misdirection. *Queen-Empress* v. *Bana Punja* (7) and *Abhi Misser* v. *Lachmi Narain* (1) dealt with the legality of punishments for combined offences rather than with failures of justice caused by the omission to frame the necessary charges. The legality of the sentences passed in the present case is not before us.

In the present instance the name of the person to whom grievous hurt was caused (Raghurama Naidu *alias* Ramaswami Naicker, P. W. 7), is not mentioned in the charge.

Whether this omission, or the omission to charge accused 1 and 6 separately with the offence under S. 326, if in the present case there was such an omission (which Odgers, J., doubts) prejudiced those accused in their defence is a matter which the Bench which hears the appeal must deal with. It is not a part of the reference to the Full Bench. We answer the first part of second question in the negative and the second part in the affirmative.

Krishnan, J.—I agree.

Ramesam, J.—I agree.

A. S. V. *Reference answered.*

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3. (1913) I L R 41 C 662.
2. (1907) I L R 34 C 698.
7. (1892) I L R 17 B 260.
1. (1900) I L R 27 C 566.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Kuppa Reddiar and others *Petitioners** (*Accused Nos.* 1, 2 *and* 4 *in C. C. No.* 5 *of* 1923 *on the file of the Asst.* 1*st Class Magistrate, Tinnevelly*).

Kuppa Reddiar, *In re.*

Criminal Procedure Code, S. 106—*Security to keep the peace—"Offence involving a breach of the peace"—Meaning of—Conviction under S.* 342, *I. P. C.—Order under S.* 106 *Cr. P. Code, if legal.*

The expression "other offence" in S. 106, Cr. P. Code, refers to offences *ejusdem generis* with the offences against public tranquillity and of assault mentioned in the section. To attract the operation of S. 106, Cr. P. Code, it is enough if the offence brought home to the accused necessarily includes or implies a breach of the peace. It is not necessary that apart from the offence, there must have ensued a breach of the peace. The facts constituting an offence must be looked at for determining whether the case comes within S. 106 or not.

Wrongful confinement *per se* is not an offence involving a breach of the peace but if the accused is found to have violently seized another person, tied his hands and wrongfully confined him in an open garden, security can be ordered under S. 106, Cr. P. Code.

In re Tirumala Reddy, 30 M L T 348 dissented from.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Assistant 1st Class Magistrate of Tinnevelly in C. C. No. 5 of 1923.

C. Narasimhachari for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—The petitioners were convicted of an offence under S. 342 of the Indian Penal Code, namely, that of wrongful confinement. What the accused actually did is described in the following words by the lower Court : "Accused 2 and accused 4. dragged him (the complainant) towards accused 1, his hands were tied. "

" Again

" He. . . testifies that accused 2 and 4. . beat P. W. 1 at the instance of accused 1 and then tied his hands and pushed him westwards. D. W. 3 testifies to the use of violence. "

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*Cr. R. C. No. 573 of 1923.
(Cr. R. P. No. 455 of 1923). 20th March, 1924.

The Magistrate made an order under S. 106 of the Cr. P. Code directing each of the accused to execute a bond with sureties for keeping the peace during a period of 12 months.

On behalf of the petitioners it has been contended that the order directing the accused to keep the peace was improperly made *as the offence in respect of which the accused were convicted does not involve a breach of the peace.*

S. 106 so far as it is material for the present purpose runs thus :—

" Whenever any person accused of any offence punishable under Chapter VIII of the Indian Penal Code (Chapter VIII deals with offences against public tranquillity) or of assault or other offence involving a breach of the peace. . is convicted of such offence before a High Court ;

And such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace ;

" Such Court may, at the time of passing sentence on such person, order him to execute a bond. "

This section in my opinion implies that offences against public tranquillity and the offence of assault involve a breach of the peace. If nothing more is proved than that one of these offences has been committed, the section applies. The next question is what do the words " other offence " mean ? In my opinion the offences intended are those *ejusdem generis* with the offences against public tranquillity and of assault which are mentioned in the section. Under the section the offence must involve a breach of the peace. These words must receive their ordinary and natural meaning. A thing is involved in another when it is necessarily included in or implied in it. In " assault " a breach of the peace enters as a necessary element. It is an ingredient of the offence. In my opinion the section applies when the offence amounts to or constitutes a breach of the peace; in other words, when breach of the peace is a component part or an ingredient of the offence. The very fact that a man commits rioting or assault constitutes a disorder, a disturbance of the King's peace, general peace of the realm. The words " breach of the peace " in the section are the antithesis of the other set of words also occurring in the section " keeping the peace. " The words " keeping the peace " connote preservation of the public peace and are the direct opposite of the words " breaking the peace."

In my view, therefore, the question to be answered in each case is, does the offence brought home to the individual necessarily include or imply a breach of the peace, or, does it constitute or amount to a breach of the peace ? If it does, the section applies.

I am not prepared to accept the construction placed upon the words in some of the cases cited at the bar, namely, that apart from the offence there must ensue a breach of the peace. If the legislature had intended to lay down a rule of that kind, entirely different words would have been used. It would then have said " any person accused of any offence punishable under Chapter VIII or of assault or other offence when the commission of such offence leads to a breach of the peace. " In my opinion it is of the essence of the offence that a breach of the peace is committed. In committing the offence of which the offender is found guilty he necessarily has also broken the peace.

Then the next question is :—

Is it intended by the section that each of the offences described in the Indian Penal Code should fall under the category of either " offences involving a breach of the peace " or offences of the opposite description ? I do not think either is desirable or possible. The facts constituting an offence must be looked at for determining whether the offence comes within the section or not. The present case is in point and strikingly illustrates what I mean. Wrongful confinement *per se* is not an offence involving a breach of the peace. If, for example, a person happens to be in a room in his own house and another by locking the room on the outside, confines the person within the room and makes egress impossible, all the elements necessary for constituting the offence of wrongful confinement are present. But this involves no breach of the peace but on the contrary if, as has happened in the present case, the offenders in a cocoanut garden using violence seizes another and ties his hand, I am clearly of the opinion that the offence as proved does involve a breach of the peace.

Several authorities were cited, but I do not think that any useful purpose will be served by my discussing the various conflicting rulings bearing on the subject and opposite and different interpretations placed upon the words in the section, but however I would add that I follow Cr. Appeal No. 1600 of 1922,

Kuppa Reddiar, *In re.*

a decision of Spencer, J., and that I respectfully dissent from *In re Tirumala Reddy* (1) decided by Kumaraswami Sastri, J.

The order therefore directing the accused to execute a bond for keeping the peace was rightly made.

As regards the merits of the case some points were urged before me, but I am not prepared to uphold any of the contentions and in the result the Criminal Revision Case fails and is dismissed.

A. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

Seshamma (widow and legal representative of the deceased Manchiraju Narayana Rao *alias* Satyanarayanamurty) *Appellant** (*L. R. of the Cr. Petr.*)

v.

Yeeranki Peda Venkata Rao (dead) and others *Respondents* (*Petitioner and his L. Rs.*).

Seshamma *v.* Venkata Rao.

Civil Procedure Code, O. 22, Rr. 4, 9—Order setting aside abatement—Appeal —Order passed without jurisdiction—Effect of—Mortgage suit—Preliminary decree after death of mortgagor—No application to bring on record legal representative in time—Abatement—Application for final decree—Application to excuse delay in impleading legal representative —"Right to sue" —If applies to case after preliminary decree but before final decree.

An order setting aside an abatement under O. 22, R. 9 is not appealable; but where the order is passed without jurisdiction and is really not one under O. 22, R. 9, the same is appealable or at least open to revision.

A preliminary decree was passed in a mortgage suit, but it subsequently transpired the mortgagor was dead at the time. No steps were taken to bring on record the legal representative in time, but more than six months after, the mortgagee applied for a final decree impleading the mortgagor's widow. She objected that the mortgagor died before the preliminary decree and as no legal representative had been brought on record in time the suit had abated. After the expiry of another six months the mortgagee applied for excusing the delay in bringing on record the legal representative. The Court of first instance dismissed both the petitions. An appeal was preferred against the order refusing to pass a final decree, but therein the appellate Court set aside the abatement.

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1. 30 M L T 348.

*A. A. O. No. 425 of 1922. 18th January, 1924.

Seshamma v. Venkata Rao.

Held, (1) as the mortgagor had died before the preliminary decree, there was no valid preliminary decree in the case ;

(2) the expression "right to sue" in O. 22, R. 4 applies also to cases where a preliminary decree had been passed but not a final decree and the legal representative must be brought on record within the period of limitation, I L R 45 Mad. 872 followed ;

(3) in the absence of a petition under O. 22, R. 9 to set aside the abatement the lower appellate Court had no jurisdiction to order the same; and

(4) as the petition to excuse the delay in bringing on record the legal representative had been dismissed and the order had not been appealed against, the same had become final and was a legal bar to setting aside the abatement.

Appeal against the order of the Court of the Additional Subordinate Judge of Cocanada in Appeal No. 78 of 1922, preferred against the order of the Court of the District Munsif of Peddapuram in E. A. No. 2411 of 1920 in O. S. No. 109 of 1918.

C. Rama Rao for appellant.

G. Lakshmanna and *A. Satyanarayana* for respondents.

The Judgment of the Court was delivered by

Wallace J.

WALLACE, J. :—This appeal is against the order of the Additional Subordinate Judge, Cocanada, setting aside an abatement of a suit, the order appealed against being passed under O. 22, R. 9. In ordinary circumstances, no appeal lies against such an order, but in the circumstances of this case it is contended that the order appealed against was passed without jurisdiction and vitiated by material irregularity.

The plaintiff, who is the respondent in this appeal, sued one M. Narayana Rao in the Court of the District Munsif of Peddapur on a mortgage and on 27th November, 1918, obtained a preliminary decree. It since transpired that the judgment-debtor died on the morning of 27th November, 1918, before the decree was passed. The plaintiff admits that, not long after the decree, he came to know of the fact of the death of the judgment-debtor, but not of the actual date of it, and assumed that he had died after the decree and that therefore the decree was valid. He took no steps to bring on the legal representatives until 27th August, 1920, when he filed E. A. No. 2411 of 1920 under O. 34, R. 5, wherein, while setting out that the judgment-debtor had died and entering his widow (the present appellant) as the defendant in the petition, he asked merely that a final decree be passed. The present ap-

pellant in her counter pointed out that the judgment-debtor had died before the preliminary decree was passed, that no petition to bring on the legal representative on record had been put in in time, that therefore the suit had abated, and that the date of limitation for bringing on the legal representatives had passed. Even after this allegation the plaintiff did nothing until 23rd March, 1921, when he put in E. A. No. 911 of 1921 in which he asked that the delay in bringing on the legal representative be excused, and that a final decree be passed. In his affidavit to that petition, he persisted in saying that the defendant judgment-debtor died after the decree and that the allegation that he died before the decree was not true.

The District Munsif dismissed both the petitions. The Additional Subordinate Judge, on appeal, held that the application, E. A. No. 2411 of 1920, may be treated as one for setting aside the abatement of the suit and that the excuse for the delay in filing such an application is reasonable and he set aside the abatement of the suit and directed the District Munsif to take it on file and proceed with it.

It is not now disputed that the judgment-debtor died before the preliminary decree was passed, that therefore the preliminary decree was a nullity, and that no steps to bring on the legal representative were taken within six months of 27th November, 1918, as required by the Limitation Act then in force. It follows that the suit abated on 26th May, 1919. The plaintiff no doubt contends that in O. 22, R. 4, the phrase 'right to sue' does not apply after a preliminary decree is passed and that therefore there is no limitation to the period within which he was bound to apply to have the legal representative brought on : but, apart from the fact that the law is at present against him on this point—see *Subbarayudu v. Ramadasu* (1)—there is the obvious rejoinder that there was in fact no valid preliminary decree and therefore the suit has not even reached the stage of a preliminary decree. Clearly then, the suit abated on 26th May, 1919.

The first point to be noted is that, though the plaintiff has never asked that the abatement be set aside, the Lower Court, nevertheless, chose to treat his E. A. No. 2411 of 1920 as a prayer for that relief. That E. A., as already pointed out, was not put in under O. 22 at all but under O. 34. Not

1. (1921) I L R 45 M 872 : 42 M L J 301.

Seshamma v. Venkata Rao

Wallace, J.

only that ; when the present appellant's rejoinder to it pointed out that the suit had abated, the plaintiff evidently, without making any enquiry, chose to take the standpoint that the suit had not abated and maintained that standpoint in his second petition E. A. No. 911 and never then asked for the abatement to be set aside. It is true that E. A. No. 911 purports to have been put in, *inter alia*, under O. 22, Rr. 4 and 9, but even then he did not pray for the abatement being set aside, nor does the lower Appellate Court make any reference to that E. A. in the body of its order. Had it been pleaded before it that E. A. No. 911 impliedly contained a prayer for the abatement being set aside, we cannot see why he should have thought it necessary to fall back on E. A. No. 2411 of 1920 in order to discover such an implied prayer for that relief, even in his grounds of appeal before the Lower Appellate Court, the plaintiff styles E. A. No. 911 merely as a petition to excuse the delay in bringing the legal representative on record. We must hold that technically there was not before the District Munsif or the Lower Appellate Court any prayer under O. 22, R. 9 to set aside the abatement, and therefore the Lower Appellate Court had no jurisdiction to set it aside.

There is a further technical difficulty in the plaintiff's way. E. A. No. 911 was dismissed by the District Munsif under a separate order, and no copy of that order seems to have been put in in the Lower Appellate Court and no petition asking to excuse the omission to file it has been filed. There was therefore no proper appeal against that order filed in the Lower Appellate Court. This may be the reason why the Lower Appellate Court ignores E. A. No. 911 altogether in its judgment. Here also, we must hold that the Lower Appellate Court had not before it any legal appeal against the order in E. A. No. 911 and had therefore no jurisdiction to set that order aside. Technically it remains in force and is a legal bar to the present appellant being brought on record as the legal representative of the deceased judgment-debtor.

Now, when it is necessary in order to do substantial justice to brush aside technicalities, the Court will not be too scrupulous in enforcing them ; but when, as we find in this case, there are no merits in the plaintiff's favour and the merits are on the appellant's side, the Court will not go out of its way to clear from the plaintiff's path technical obstacles. As already pointed

out, although the plaintiff knew of the death of the judgment-debtor, he did not make any enquiry as to when it had occurred or make any attempt to have the legal representative brought on record within the legal period, six months. He did not even in E. A. No. 2411 ask the legal representative to be brought on record and he did not do so until 23—3—1921, nearly two years after the last day for bringing on the legal representative ; and, even though it had been pointed out to him on 4—12—1920 by the appellant's counter that the suit had abated, he omitted or refused to make any enquiry, categorically said that that allegation was not true, and refused to believe that there had been any abatement, and that there should be a petition to set it aside. So that even now up to date there is no petition to set aside the abatement. The Lower Appellate Court's reasons for indulging the plaintiff are based wholly on unsupported surmises ; that the plaintiff's pleader might have been ignorant of the law or that the plaintiff had this or that mistaken idea in his head. He announces a general plenary indulgence to parties to take their own time for applying for a final decree and that the " usual procrastination of plaintiffs " is a good ground for calling in aid S. 5 of the Limitation Act. Such a principle is subversive of that Act altogether. We cannot see any ground for granting any indulgence to such a dilatory, negligent and mendacious party and we are not prepared to override the technical difficulties in the plaintiff's way.

We hold therefore that the Lower Appellate Court's order is without jurisdiction, first because it had before it no prayer to set aside the abatement and no substantive motion under O. 22, R. 9, and secondly because that it had no jurisdiction to revise the order on E. A. No. 911 which was not properly before it. It follows that its order, though technically one under O. 22, R. 9, and technically not appealable under that order was not really passed under that order because it was passed without jurisdiction, and is therefore appealable or at least open to revision on the ground that it was without jurisdiction. We therefore set aside and restore that of the District Munsif with costs of the appellant throughout.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Venkatanarayana Chetty and another *Appellants** (*Petitioners in A. A. O. No.* 46 *of* 1921)

v.

Sevugan Chetty and others *Respondents in both* (*Counter-petitioners*).

Venkatanarayana Chetty *v.* Sevugan Chetty.

Provincial Insolvency Act, S. 39 (4)—*Rules framed by the Madras High Court—R.* 21 (*b*)—*Creditor—Claim for final dividend—Notice—Form of—Strict compliance necessary.*

Under R. 21 (*b*) of the Rules framed by the Madras High Court under the Provincial Insolvency Act (III of 1907), the notice to be sent by the Receiver under S. 39 (4) of the Act should be in the form of a registered letter addressed to each creditor. If the Receiver proposing to declare a final dividend does not strictly comply with the provisions of the Rule and a creditor as a result of not getting such a notice fails to prove his claim and is therefore not given his dividend, he should be allowed to reopen the matter and be given an opportunity to prove his claim within a time to be fixed by the Court.

Appeals against the orders of the District Court of Salem in I. A. No. 71 of 1919 and I. A. No. 72 of 1919 in I. P. No. 3 of 1912, dated 17th April, 1920.

S. T. Srinivasagopalachari for appellants.

K. Bhashyam Aiyangar for respondents.

The Judgment of the Court was delivered by

Krishnan, J.

KRISHNAN, J. :—*C. M. A. No.* 46 *of* 1921 :—This is an appeal in an insolvency proceedings which began in 1912. The appeal is by one of the creditors. He claimed to be entitled to a dividend from the assets realised from the insolvent's estate. His application was dismissed by the learned District Judge on the ground that the final dividend had been declared before his application was filed and that the distribution of the dividends so ordered could not be revised so as to include his share, as he knew that such dividend was going to be declared and took no steps in time. The learned Judge points out that he appeared in Court in person when it was claimed by the Official Receiver that a property transferred to him by the insolvent was not validly transferred; it was a case of a fraudulent preference and the Receiver applied to have the alienation set aside and it was set aside. The learned Judge holds that

*A A O Nos. 46 and 47 of 1921. 25th March, 1924.

he should have kept in touch with the proceedings in Court ; and as he had tendered no proof of his claim in time he was rightly refused his share in the dividend. Now the difficulty in adopting this view is that under S. 39, cl. 4 of the Provincial Insolvency Act of 1907, a particular form of notice to creditors whose claims have been notified but not proved is prescribed whenever a final dividend is to be declared. It appears that in this case such a notice had not been given to the creditor. Under R. 21 (*b*) of the Rules framed by this Court under the Insolvency Act, it is prescribed that the notice under S. 39 (4) should be in the form of a separate registered letter addressed to each creditor. S. 39 (4) says also that the creditor should have express notice that the Receiver is proceeding to make a final dividend and that he would do so without regard to the claims of the creditor if he does not take care to prove his debt in time. When a notice of that sort is prescribed by the rules made under the statute a strict compliance with the rule is necessary before the creditor's claim to share in the final dividend can be disallowed.

We have not been referred to anything to show that the appellant has proved his claim up to date or that his proof has been accepted. But as the Court did not send the necessary notice as required by the section we think that the creditor should be allowed to re-open the matter and that he should be given an opportunity of proving his debt within a time to be fixed by the lower Court. We are saying all this on the footing that the final dividend has been declared in this case. The learned Judge says that there was only one dividend and that was the final dividend in the case. If, however, the dividend that has been declared is not the final dividend in the case, of course the creditor will have to share in it for none of these remarks made above will apply to the case. That is a matter that should be considered and decided by the lower Court ; it must see whether the dividend declared was the final dividend or whether any further assets are available for payment of another dividend. The order of the lower Court is set aside and the case will go back to the lower Court for disposal in the light of the observations made by us. As regards the costs of this Appeal we think we would not be justified in giving any costs to the appellants as all the delay and difficulty has arisen from the fact that he delayed the tendering of proof

Venkatanarayana Chetty v. Sevugan Chetty. — Krishnan, J.

of his debt. We direct each party to bear its costs in this Appeal.

C. M. A. No. 47 will follow C. M. A. No. 46 of 1921 and the same order will be passed in it.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE RAMESAM.

The Commissioner of Income-tax, Madras *Referring Officer**

v.

Messrs. Binny & Co. (Madras), Ltd. *Assessee.*

Commissioner of Income-tax, Madras v Binny & Co., Madras.

Income-tax Act—Super-tax—Liability for—Undivided profits—Capitalisation of—Bonus shares newly issued on basis of—Super-tax on value of—Share-holder's liability for.

A company called the Deccan Sugar and Abkari Co., Ltd., was incorporated in 1897 with a share capital of ten lakhs in shares of Rs. 500 face-value each. In 1908 the capital was increased to 22 lakhs by adding 7,000 Preference shares of the A Class of Rs. 100 face-value each and 5,000 Preference shares of the B Class also of Rs 100 face-value each. In 1908, in pursuance of a Resolution passed in June the ordinary share capital was reduced to Rs. 1,66,672, thus making the total capital of the company something over 13 lakhs. Messrs. Binny & Co., Ltd. held 200 ordinary shares of Rs 125 each in this company. In 1921 the Deccan Co. had on its books a surplus accumulation of profits undistributed of practically 5 lakhs of rupees. In July 1921, by a special Resolution, which was confirmed in the following month, the Articles of the company were amended, one of the first amendments enabling the company, by a special Resolution, to sub-divide or consolidate its shares or any of them ; the other was a new Article by which the company, by a special Resolution, might at any time take to itself the power to capitalise undivided profits or reserve fund. In pursuance of the new Article, the company capitalised the undivided profits. Each holder of a share of Rs 125 became the holder of three additional shares. The capital of the company was increased by 1,328 shares of Rs 375 each. The result was that Messrs. Binny & Co. for 200 shares of Rs 125 each got 200 shares of Rs 500 each, and in 1921 scrip carrying out that change of position was issued.

On a question arising whether the issue of new shares to the share-holders representing their share in the accumulated surplus was taxable as income, *held,* that Messrs. Binny & Co. was not liable to pay super-tax on the value of shares newly issued by the Deccan Sugar and Abkari Co., Ltd., in the year 1921.

Case stated under S. 66 (2) of the Indian Income-tax Act for decision of the question whether the assessee, Messrs.

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*R C No. 1 of 1924. 27th March, 1924.

Binny & Co. (Madras), Ltd., as a share-holder in the Deccan Sugar and Abkari Co., Ltd., is liable to pay supertax on the value of bonus shares newly issued by the Deccan Sugar and Abkari Co., Ltd., in the year 1921.

Nugent Grant instructed by *L. M. Taylor,* Attorney, for assessee.

The Government Pleader on behalf of Government.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This is a reference by the Commissioner of Income-tax which raises a very simple point in the sense that it can be put within a narrow compass on a very few undisputed facts ; in another sense it raised a subtle question of law, for it has given rise to a great variety of judicial opinion in very high quarters.

Coutts Trotter, C.J.

Now the facts are these. A company called the Deccan Sugar and Abkari Co., Ltd. was incorporated in 1897 with a share capital of ten lakhs in shares of Rs. 500 face value each. In May 1908, the capital was increased to 22 lakhs by adding 7,000 Preference Shares of the A class of Rs. 100 face value each and 5,000 Preference Shares of the B class also of Rs. 100 face value each. In 1908, in pursuance of a resolution passed in June, the ordinary share capital was reduced to Rs. 1,66,672, thus making the total capital of the company something over 13 lakhs. Messrs. Binny & Co., Ltd. held 200 ordinary shares of Rs. 125 each in this company. In 1921 the Deccan Company had on its books a surplus accumulation of profits undistributed of practically 5 lakhs of rupees. In July 1921, by a special resolution, which was confirmed in the following month, the Articles of the Company were amended, and the two important amendments were these: The first was a preliminary one enabling the Company, by a special resolution, to sub-divide or consolidate its shares or any of them. The other was a new Article 133-A by which the Company, by a special resolution, may at any time take to itself the power to capitalise undivided profits or reserve fund and that is what purported to take place in this case. Each holder of a share of Rs. 125 became the holder of three additional shares. The capital of the Company was increased by 1,328 shares of Rs. 375 each and therefore the result was that Messrs. Binny & Co. for 200 shares of Rs. 125 each got

200 shares of Rs. 500 each, and in 1921 scrip carrying out that change of position was issued.

The question we have to decide is whether this issue of new shares to the share-holders representing their share in the accumulated surplus is taxable as income. I propose to say very little about this matter, because, to my mind, it crystallises for our purposes into two questions. The first is, are we concluded by the decision of the Privy Council in *The Swan Brewery Case* (1) ? The next is, are we at liberty, or is it desirable if we are not covered by the Privy Council decision, to decide contrary to the majority of the House of Lords in *Blott's Case* (2) ?

Now, it is best that I should deal with the first contention at the outset. It is suggested that *The Swan Brewery's Case* (1) directly covers the present point, but with great respect to certain observations of Lord Sumner in *Blott's Case* (2) I am unable to say that it does cover. If it does, of course, we as an Indian Court are not at liberty to say, as some of the members of the House of Lords did in *Blott's Case* (2), that it was erroneously decided. If it does not decide the point finally for the House of Lords, it decides that finally and conclusively for this Court. That was a decision on an Act known as the Dividend Duties Act of Western Australia, which, to put it shortly, taxed dividends and contained a definition of ' dividends, ' which covered every profit, advantage or gain intended to be paid or credited to or distributed among any members of any Company. It is quite obvious that a distribution of what was conveniently called Bonus shares is an advantage to the share-holder, and therefore, one may conclude that, on the words of the Act, their Lordships of the Privy Council had no option but to hold that this was a dividend within the meaning of the Act. Lord Sumner, in delivering the judgment of the Board said this :—" In ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend " (it has to be observed that what is made taxable by the Act is a dividend and nothing more). " The question in issue, " his Lordship goes on, " here is whether or not the new shares were a dividend under the Act above-mentioned. " Now, if that judgment stood alone unexplained by any subsequent utterance of his Lordship, I should infer that not merely was

1. (1914) A C 231. (1921) A C 171.

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it a decision on the words of that statute but that it was carefully confined to be a decision on the words of the Australian Statute with an intimation that, but for that statute the word could not be capable of bearing the meaning required to be put upon it before the Crown could succeed. But in *Blott's Case* (2) there is no doubt about it that Lord Sumner undoubtedly said that he had intended to lay down a wider principle, and that principle so far as I can see is this Ever since the decision in *Trevor and Witworth* (3) it has been the accepted law that a Company cannot buy its own shares. That is used as I follow the reasoning of Lord Sumner and Lord Dunedin to found this contention, that, as a Company cannot buy its own shares, that is to say, cannot pay its funds into its own coffers and issue scrip to itself, what must be supported to have taken place, as Lord Sumner says, notionally is that, although no such thing in fact happened, the company paid its profits over to the share-holder and that that share-holder repaid them and in return got scrip handed to him, which of course would give him a draft on the capital of the company. In my opinion, that reasoning is completely answered by the reasoning of Viscount Haldane and Viscount Finlay. I will just refer very briefly to one or two passages in Lord Finlay's judgment at page 192 of the report. He says this "The general scope and effect of these transactions is beyond dispute. There was an increase in the capital of the company by the retention of the amounts available for dividends. Though the number of shares was increased by the issue of the new preference shares to the ordinary share-holders, this did not affect the proportions to which they were entitled in the undertaking and in any profits. All the share-holders received these new preference shares, so that the proportion in which they were to share in any profits remained the same. The use of the sums which had been available for dividend to increase capital would enable the company to carry on a larger and more profitable business, which might be expected to yield larger dividends. These dividends, however, were to be in the future so far as the present was concerned there was no dividend out of the accumulated profits ; these were devoted to increasing the capital of the company." Then again at page 194, "The effect of this operation (that is, the one which

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(1921) A C 171.

3. (1887) 12 A.C 409.

Commissioner of Income-tax, Madras v. Binny & Co., Madras.

Coutts Trotter, C. J.

he described) was that the amount of the bonus was retained by the company as additional capital, and that the share-holders got the new preference shares. No option was left to any particular share-holder. He was compelled by the action of the company to take the preference shares. He could not have sued for the bonus in money as the resolution which gave the bonus *uno flatu* declared that it was to be satisfied by the distribution of preference shares. Under these circumstances it seems to me impossible to treat the share-holders for the purpose of supertax as having received the bonus and paid it back to the company to be retained as capital. They never received it at all. The case appears to stand exactly as Rowlatt, J., put it in *Inland Revenue Commissioners* v. *Blott* and *Inland Revenue Commissioners* v. *Greenwood* (4) :— " I do not think that there is a payment of a dividend to a share-holder unless a part of the profits of the company is thereby liberated to him in the sense that the company parts with it and he takes it. " If I may humbly add a word in such a distinguished company I think it might be put in this way " That you cannot say that there is a notional payment of a dividend to a share-holder when the position is that, if he sued for it his action must be dismissed. " That is to say, when the whole conception that he is entitled to the dividend is one that the law refuses to countenance. That being so, it is enough for me to say that I think that this Court, having regard to the fact that the words of the Indian Statute are, for all practical purposes identical with those of the English Statute, should respectfully follow the opinion of the majority of the highest Court in the Empire.

I must add this that, in doing so, the learned Lords were confirming the unanimous decision of a very strong Court of Appeal of three very eminent Lords Justices. I may also add that of the majority of the House of Lords whose view prevailed, two at least were eminent and distinguished Company Lawyers, and the dissentients were in the same unfortunate position as myself of being only common Lawyers. I should also like to add this, that I think it is extremely improbable that this arrangement about the distribution of these profits and the manner in which the transaction should be carried through was drafted without reference to the English cases. I do not know whether at the time the Resolution was drafted

4. (1920) 1 K-B 114, 133.

the decision of the House of Lords was available, but, at any rate, the decision of the Court of Appeal in *Inland Revenue Commissioners* v. *Blott* (4) and *Shone* v. *Greenwood* (5) was available. I have looked at that decision and it expresses the opinion that that decision was determined by the decision in *Bouch* v. *Sproule* (6), itself a House of Lords' decision, and that opinion of the Court of Appeal must have been available to the learned gentleman who drafted these articles and amendments to articles. I also observe that both Viscount Haldane and Viscount Cave agreed with the Court of Appeal in thinking that the matter before them in *Blott's Case* (2) is concluded by the previous decision of the House of Lords. In these circumstances, although I have treated the matter as one of law, I think that it would be an undesirable and inequi table result if we had to come to any other conclusion than that which I have arrived at.

Our answer to the reference is that the company Messrs. Binny & Co. is not liable to pay super-tax on the value of shares newly issued by the Deccan Sugar and Abkari Co., Ltd. in the year 1921. The company will have its costs on the O. S. scale.

Ramesam, J. :—I agree. There are three features in this case as in *Blott's Case* (2) which make it difficult for a Court to say that the additional shares issued amount to income. The first is that there was no option to the shareholders, and it was not open to them to sue for the additional dividend in the shape of cash or in the shape of other chattels or goods. The Resolution of the Company compelled them to take it only in the form of additional shares and in no other. This feature was emphasised by all the Law Lords who formed the majority in *Blott's Case* (2). The next feature which perhaps is a corollary from the first is this The relative situation of each share-holder to the other share-holders in the company remains unaltered. His proportion out of the total earnings that may be set apart for distribution as dividends among the share-holders remains the same after this operation of the company. To explain it further, if, for instance, in any year, the amount of profits that is set apart available for distribution among the share-holders is one lakh, the propor-

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4. (1920) 1 K B 114, 133.

2. (1921) A C 171. 5. (1920) 2 K B 657. 6. 12 A C 385.

Commissioner of Income-tax, Madras v. Binny & Co., Madras.

Ramesam, J.

tion which a particular share-holder gets remains the same after the increase in shares as before. If formerly a share-holder got 32 per cent. on shares of Rs. 125 each, now he will be getting Rs. 40 for each share of Rs. 500, *i. e.*, 8 per cent. on shares of Rs. 500, the total income would be the same amount.

The third feature which again may be regarded as a corollary from the other two is that the effect is the same as if the company passed a Resolution expanding its operations and for increasing its machinery. This has been pointed out by Viscount Finlay at page 196 in (1921) 2 A. C. It is true that, as Lord Sumner points out, there was a payment in *Bouch* v. *Sproule* (6), a dividend warrant was sent out in the form of a negotiable instrument, which had it been presented payment must have been made. But this fact only served to distinguish *Bouch* v. *Sproule* (6) from the case before the House of Lords in (1921) A. C. If that distinction is emphasised, it follows that we ought to agree with the decision of the majority in *Blott's Case* (2). It may be that the effect of the operations in question by the company is to increase the value of a share and, if a particular share-holder sells his enhanced share, he may realise more in the market as pointed out by Viscount Cave. This amounts to only realising his assets in the shape of capital and not in the shape of income.

I agree with the answer proposed by my Lord.

A. S. V. *Reference answered.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT:—LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

Madhavrao Vaman and others *Appellants**

v.

Raghunath Venkatesh and others *Respondents.*

P. C.

Madhavrao Vaman v. Raghunath Venkatesh.

Adverse possession —Vatan lands —Permanent tenancy in—Acquisition by adverse possession of title to—Person claiming by adverse possession already a tenant of the lands under vatandar—Effect—Stranger to vatan lands—Acquisition of title by adverse possession to same—Possibility in law of—Suit in which stranger claims such title—Parties—Secretary of State for India in Council if a necessary party—Alienation by vatandar of service vatan lands—Law as to—Bombay Act III of 1874, S. 5—Object of —Regulation XVI of 1827—S. 20—Alienation—Grant of right of permanent tenancy in vatan lands, if any.

2. (1921) A C 171. 6. 12 A C 385.

*P C Appeal No. 89 of 1922, 10th July, 1923.

P. C.

Madhavrao Vaman v. Raghunath Venkatesh.

In a suit by Vatandars foi the ejecetment from service vatan lands of defendants, not one of whom was a vatandar of the vatan, the latter alleged that they acquired adversely to the family of the plaintiffs a right to the possession of the lands in question as permanent tenants, and enjoyed that right for more than 12 years before suit in the lifetime of the father of the plaintiffs, and that " the cause of action arose in the year 1865, when the plaintiffs' grandfather died." The defendants and their predecessors-in-title always claimed to be and were tenants of the suit lands under the Vatandar.

Held, that neither the defendants nor their predecessors-in-title could have acquired any title to a permanent tenancy in the lands by adverse possession as against the Vatandai from whom they held the lands.

The decision in *Radhabai* v. *Anantrao,* (1885) I. L. R. 9 Bom. 198 (F. B.) must be confined to a case of an absolute assignment of service vatan lands by a Vatandar to a stranger, who alleged that he had obtained title by 12 years of undisturbed possession.

Quaere : Whether the decision so understood was or was not correct, and whether a stranger to a vatan can acquire a title by adverse possession for 12 years of lands, the alienation of which was, in the interests of the State, prohibited.

Quaere : Whether the Secretary of State for India in Council, as representing the interests and rights of the Crown in service vatan lands, is not a necessary party to a suit in which a stranger claims that he is entitled to those lands by a right of adverse possession ?

Law as to the alienation by a Vatandar of his service vatan lands as it was in 1853, and its history down to 1914.

S. 5 of Bombay Act III of 1874 was passed, as was S. 20 of Regulation XVI of 1827, in the interests of the State, and not in the interests of the Vatandars only.

The granting by a Vatandar of a right of permanent tenancy in lands of his vatan would undoubtedly be an alienation within the meaning of S. 20 of Regulation XVI of 1827.

Appeal from a judgment and decree (June 17, 1918) of the High Court of Bombay reversing the decree of the Subordinate Judge of Belgaum.

Sir George Lowndes, K. C. and *Brown* for appellants.

Raikes for respondents.

10th July, 1923. The Judgment of their Lordships was delivered by

Sir John Edge.

SIR JOHN EDGE :—The suit in which this appeal has arisen was brought on 22nd October, 1914, in the Court of the First Class Subordinate Judge of Belgaum by Vatandars for the ejectment of the defendants from service Vatan lands in Mauza Bhivashi in Taluka Chikodi in the District of Belgaum, and for mesne profits. The defendants are not Vatan-

P. C.

Madhavrao Vaman v. Raghunath Venkatesh.

Sir John Edge.

dars, nor is any one of them a Vatandar, of the Vatan. The defendants Nos. 1 to 4 in their written statement allege that they, from before 1853, acquired adversely to the family of the plaintiffs a right to the possession of the lands in question as permanent tenants, and enjoyed that right for more than twelve years before suit in the lifetime of the father of the plaintiffs, and that "the cause of action arose in the year 1865, when the plaintiffs' grandfather died." The title, if any, of the other defendants depends on the title of the defendants Nos. 1 to 4.

The facts of the case will be briefly stated presently, but in order to see whether under those facts the defence of adverse possession is maintainable, it is necessary to bear in mind what the law as to the alienation by a Vatandar of his service Vatan lands was, in 1853, and has been down to the institution of this suit.

Regulation XVI of 1827 was passed by the Governor of Bombay in Council on 1st January, 1827. Before that Regulation was passed a Vatandar could, apparently without the sanction of the Government, assign or mortgage his service Vatan lands and could grant to any one a permanent lease of them, but the effect of Ss. 19 and 20 of the Regulation was to prohibit, in the interests of the State, all such Vatandars from alienating in any way the service Vatan lands which they held as Vatandars. Ss. 19 and 20 of that Regulation applied to the lands in the suit. Ss. 19 and 20 of that Regulation continued in force until they were repealed by Bombay Act III of 1874, but the repeal of those sections by Act III of 1874 did not make valid any alienation of service Vatan lands which had been prohibited by Regulation XVI of 1827 : *Padapa* v. *Swamirao* (1). S. 5 of Bombay Act III of 1874 now applies to the lands in question. That section is as follows :—

"V. No Vatandar shall, without the sanction of Government, sell, mortgage, or otherwise alienate or assign any Vatan or part thereof or interest therein to any person not a Vatandar of the same Vatan."

That section of Bombay Act III of 1874 was passed, as was S. 20 of Regulation XVI of 1827, in the interests of the State and not in the interests of the Vatandars only. The granting by a Vatandar of a right of permanent tenancy in lands of his Vatan would undoubtedly be an alienation within the meaning of S. 20 of Regulation XVI of 1827.

1. (1900) I L R 24 Bom. 556, 561 ; L R 27 I A 86, 90.

P. C.

Madhavrao Vaman v. Raghunath Venkatesh.

Sir John Edge.

The facts of the case may be briefly stated as follows The lands in suit are service Vatan lands, and were in the possession of Appaji, who was the grandfather of the defendants Nos. 1 and 2 and the uncle of the defendants Nos. 3 and 4. In 1853, Appaji held those lands and other service Vatan lands of the Vatan as a tenant of Venkatrao, the Vatandar, at a yearly rent of Rs. 42. Venkatrao was the grandfather of the plaintiffs. Some of these lands which Appaji held as a yearly tenant were, in or before 1853, taken by the Government for the purpose of making a public road, and consequently Appaji and Venkatrao agreed to re-adjust the rent by reducing it to Rs. 36 a year. That agreement was embodied in a document which was signed by Venkatrao on 15th March, 1853. That document as translated is as follows :—

"SHRI,

"In the service of Rajashriya Virajit Rajamanya Rajashri Appajipant Appa Saundalgekar, residing at Nipani,

Profound salutations of protege Venkatrao Narayan Deshpande, Prant Kagal. Special representation is as follows. Further. Our Deshpandki land measuring 15 bighas, situate in Mauza Bhivashi Prant aforesaid, stands in the name of Ti. Rajeshri Dajipant Baba, and I am the owner of the same. So from before the said land has been given you for cultivation for a fixed rent of Rs. 42 (forty-two) in Panali coin and at the time of survey a road is shown in the said land and in it some land was covered by the road. Therefore Rs. 6 (six) out of the said amount of rent are remitted to you and the said land is given you for cultivation by fixing a rent of Rs. 36 (thirty-six) in Panali coin per year. So from the Fasli year 1262 (1852—1853) you should pay every year thirty-six rupees the amount of said rent by four instalments, and you should cultivate the land permanently. In the interval we shall never interfere with the land (that is) with you. After you, your heirs also should pay the amount of rent according to the said agreement and permanently enjoy the land. We are entitled to receive the amount of rent of the land and we are not at all entitled to take away the land from you and you should not give it up. Neither we nor our heirs will put forth any obstructions to act according to the agreement. The agreement is duly given in writing as above. Date 15th March, 1853, being Sur year 1253, Fasli year 1262. May you be gracious. This is the request.

(Sd.) VENKATRAO NARAYANRAO DESHPANDE,
Sadal.

Written by Abaji Nilkant Kulkarni, Mauza Shirgopi.

Attestations :—

1. Keshav Vithal Mutpalkar, residing at Nipani, my own handwriting.
1. Narhar Yeshwant Dahiwadkar, my own handwriting."

That document was registered, and in accordance with it, Appaji paid the yearly rent of Rs. 36 to Venkatrao until Venkatrao died in 1864 or 1865.

P. C.

Madhavrao Vaman v. Raghunath Venkatesh.

Sir John Edge.

Venkatrao was succeeded as Vatandar by his son, Ramchandra, who was the father of the plaintiffs. After Venkatrao had died, one Gundo, in 1869, brought a suit against Venkatrao's widow, to recover a debt which had been due to him by Venkatrao, and obtained against her a decree. In execution of that decree Gundo caused the land now in suit to be attached. Appaji intervened with an application to set aside the attachment on the ground that he held the lands as a permanent tenant, and thereupon the Court, on 20th June, 1870, ordered that the landlord's interest in the land should be sold without affecting Appaji's interest as a permanent tenant. At the sale, in execution of his decree, Gundo became the purchaser. It is not necessary to consider whether the Court had any power to order that sale.

On 17th January, 1872, it was agreed between Gundo and Appaji, by registered document, that Appaji, as the permanent tenant of the lands in suit, should pay to Gundo the Rs. 36 rent and for twenty years an additional sum of Rs. 42 a year. The Rs. 36 and Rs. 42 were paid yearly from 1872 to 1890 to Gundo by Appaji and after his death by his son Vaman, who was the father of the defendants Nos. 1 and 2.

On 16th May, 1887, Ramchandra, the father of the plaintiffs, who was then the Vatandar, executed a document, which was registered, by which he purported to grant to one Sintre a permanent lease of the lands now in suit at a rent of Rs. 50 a year, with a *nazrana* of Rs. 700, and put Sintre in possession of the lands. This led to disputes between Sintre, Vaman, Gundo and one Nana Babaji Patil, who claimed to have bought the lands in execution of some decree ; the disputes were referred by those persons to arbitration. Ramchandra was not a party to that arbitration. In that arbitration, Vaman stated that he had been temporarily deprived of the possession of the lands. On 1st January, 1894, the arbitrators made their award and by it ordered that Vaman should pay Rs. 700 to Sintre, Rs. 340 to Gundo and Rs. 1,150 to Nana Babaji, and should continue to enjoy the lands as a permanent tenant. That award was, on 29th March, 1894, made a decree of Court. The payments so ordered were made by Vaman. From 1895 to 1902 Vaman paid the rent of Rs. 36 a year to Ramchandra. In Ramchandra's receipts for those payments he acknowledged that Vaman held the lands as a permanent tenant. In the Record

P. C.

Madhavrao Vaman v. Raghunath Venkatesh.

Sir John Edge.

of Rights of 1911—12 the defendant No. 1 was entered as the permanent tenant of the lands. Upon the death of Ramchandra the defendants tendered to the plaintiffs the rent of Rs. 36 yearly as their rent as permanent tenants, but the plaintiffs refused to receive the money so tendered. Ramchandra died on 29th October, 1902, and the plaintiffs succeeded him as the Vatandars. Upon the facts which have briefly been stated being proved the Subordinate Judge found that the evidence in favour of the permanent tenancy alleged by the defendants Nos. 1 to 4 was overwhelming. He stated in his judgment that:—

"It is undisputed that the land sued for is a Deshpande Vatan (Vatan) Inam. There is no doubt that the original grantor (Venkatrao) had only a life interest in it and had no power to lease it beyond his life-time. Plaintiffs' grandfather (Venkatrao), who passed (granted) the lease of 1853, died in 1864-5, and the plaintiffs' father (Ramchandra) had 12 years from that time for disputing the lease. Not having done so, plaintiffs' right of disputing the permanent lease and claiming possession is barred. *Rama* v. *Shamrao* (2) *Radhabai* v. *Anantrav* (3).

The Subordinate Judge gave the plaintiffs a decree for six years' rent at the rate of Rs. 36 a year, amounting to Rs. 216 and otherwise dismissed the suit with costs.

From that decree the plaintiffs appealed to the High Court at Bombay. The appeal was heard by Sir Basil Scott, C. J. and Mr. Justice Hayward. Those learned Judges stated that "The only question which really arises in this appeal is whether the defendants can claim to have established a right to a permanent tenancy by adverse possession." They held that adverse possession commenced to run on the death of Venkatrao, but they referred to the agreement of 17th January, 1872, between Gundo and Appaji, and holding that Gundo, after the purchase by him in 1870, represented the Vatandar so far as these lands in question are concerned, they decided that it was impossible to hold that adverse possession in favour of the person claiming to be a permanent lessee continued to run after that agreement. If that decision were correct, as to which it is not necessary for their Lordships to express any opinion, Appaji and his son Vaman were not holding adversely from January, 1872, until 1894. Those learned Judges also held, and their Lordships think rightly, that there had been two breaks in the alleged adverse possession within twelve years of the death of Venkatrao, but they do not base the

2. (1904) 7 Bom L R 135. 3. (1885) I L R 9 Bom 198 (F B).

P. C.

Madhavrao Vaman v. Raghunath Venkatesh.

Sir John Edge.

advice which they will give to His Majesty upon that fact. Those learned Judges, in conclusion, stated in their judgment that: "It appears to us, therefore, that the defendants cannot, on a review of the occurrences during the lifetime of the plaintiffs' father (Ramchandra), contend that there has been any continuous adverse possession for twelve years until the plaintiffs' father's death in 1902, which would entitle them to claim to occupy the land in suits as permanent tenants. It is not disputed that since 1902 the plaintiffs declined to accept rent from the defendants, and that their suit has been filed within twelve years of their father's death. For these reasons we set aside the decree of the lower Court and pass a decree in favour of the plaintiffs for possession and mesne profits of the land in the occupation of the defendants," with all costs. From that decree this appeal has been brought by the defendants Nos. 1 to 4. The other defendants are nominal respondents to this appeal; they have not appeared.

One of the authorities upon which the Subordinate Judge relied for his decision that the suit of the plaintiffs was barred by limitation was *Radhabai* v. *Anantrav* (3). That was a Full Bench decision of the High Court of Bombay in which Sir Charles Sargent, C. J., delivered the leading judgment. The judgments of the late Sir Charles Sargent always deserve and receive careful consideration by the Board. The material point of that decision, so far as it has a bearing on the present case, is briefly stated in the head note to the report of that case thus :—

"*Held* (1), that, in the absence of fraud and collusion, adverse possession for twelve years during the life-time of one holder of service Vatan lands is a bar to succeeding holders."

The lands there in question were service Vatan lands, to which S. 20 of Regulation XVI of 1827 applied. The plaintiff there sued for the possession of service Vatan lands and for mesne profits. The defendants claimed to be in possession of the lands under a grant of 1838 to them of the lands made by the plaintiffs' grandfather, who was, at the time of the grant. the Vatandar, and they pleaded limitation by adverse possession; the adverse possession relied upon by the defendants being apparently their having continued in undisturbed possession for a period of twelve years after the death of the grantor. The plaintiffs' case was that his grandfather, the grantor, had no

3. (1885) I L R 9 Bom 198 (F B).

P. C.

Madhavrao Vaman v. Raghunath Venkatesh.

Sir John Edge.

power to make a grant of the lands except for his lifetime and that his (the plaintiff's) father had no authority to allow the lands to continue in the possession of the defendants. Sargent, C. J., and Mr. Justice Nanabhai Haridas had referred three questions to the Full Bench. It is only necessary to refer to the first of those questions which was "(1) Whether adverse possession for twelve years during the lifetime of one holder is a bar to succeeding holders ?" The Full Bench decided that in the absence of fraud and collusion, the first question should be answered in the affirmative, leaving what is to be considered an adverse possession to be determined in each particular case. The question and answer to it of the Full Bench would, when looked at in ignorance of the facts of the case, appear to be general and not confined to a case of an absolute assignment of service Vatan lands by a Vatandar to a stranger, who alleged that he had obtained title by twelve years of undisturbed possession. It is necessary to see what that answer to the first question really meant. And for that purpose, it is, in their Lordships' opinion, necessary to see what the alienation then in question really was. It was not an alienation by a lease of a permanent tenancy to a tenant of the Vatan ; it was a sale and absolute assignment to a stranger to the Vatan and to the family of the Vatandar, followed by a period of twelve years after the death of the grantor, during which the stranger assignee was allowed by the successors of the Vatandar grantor to continue in undisturbed possession of the Vatan lands. In either case the grant would be beyond doubt an alienation which was prohibited by S. 20 of Regulation XVI of 1827, but having regard to the facts of the case which was before Sir Charles Sargent, C. J., and Mr. Justice Nanabhai Haridas, which justified their order of reference to the Full Bench, all that the Full Bench can be taken as having decided was that a stranger to the Vatan, who had got possession of service Vatan lands by an absolute assignment to him by a grantor, who was at the time of the grant the Vatandar, could successfully defend a suit for possession of those lands by a subsequent Vatandar by proving that after the death of the grantor he had been in undisturbed possession of the lands for a period of twelve years. A careful consideration of Sir Charles Sargent's judgment, as given in *Radhabai* v. *Anantrav* (3) shows that he was considering the question referred to the Full Bench from the point of view of the grantee having been a stranger to the Vatan. It is not

3. (1885) I L R 9 Bom 198, 210.

P. C.

Madhavrao Vaman v. Raghunath Venkatesh.

Sir John Edge.

necessary for their Lordships to decide in this case whether the answer of the Full Bench, limited as it must have been to the case of a stranger to the Vatan, setting up as a defence, twelve years' adverse possession, was or was not correct, although they are constrained to say that it is somewhat difficult to see how a stranger to a Vatan can acquire a title by adverse possession for twelve years of lands, the alienation of which was, in the interests of the State, prohibited. Their Lordships may say, further, that if it was necessary for them to decide whether the answer of the Full Bench to the first question referred to that Bench was or was not correct it would be necessary for them to consider whether the Secretary of State for India in Council, as representing the interests and rights of the Crown in service Vatan lands, was not a necessary party to a suit in which a stranger claimed that he was entitled to those lands by a right of adverse possession.

In the present case the defence of twelve years' adverse possession as permanent tenants is set up by persons who and their predecessors-in-title, always claimed to be and were tenants of service Vatan lands, and in the opinion of their Lordships neither the defendants nor their predecessors-in-title could have acquired any title to a permanent tenancy in the lands by adverse possession as against the Vatandar from whom they held the lands.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants : *Edward Dalgado.*

Solicitors for respondents 1, 2 and 3: *T. L. Wilson & Co.*

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE RAMESAM.

Venkatramana Pai ... *Appellant** (*Plaintiff*)

v.

Sampa *alias* Santappa Mallayya and others ... *Respondents* (*Defendants* 2 *to* 4).

Venkatramana Pai v. Sampa.

Lease—Construction—Religious endowment —Trustee —Absence of words importing permanency —Duration of lease.

Where the trustee of a religious endowment in South Canara grants a lease, but there are no words such as *mulgeni* indicating a permanent grant, Courts

*S. A. Nos. 410 and 411 of 1921. 26th February, 1924.

should put a liberal construction on the same and carry into effect the intention of the parties. Such leases where no period is fixed must be recognised as valid for the life of the lessor or trustee and words apparently wider in import must be read as limited to the life-time of the lessor *qua* trustee. A suit for recovery of the properties within 12 years of the death of the lessor trustee will be in time.

Venkatramana Pai v. Sampa.

Second Appeal against the decrees of the Court of the Subordinate Judge of South Kanara in A. S. Nos. 151 and 150 of 1920 respectively, (A. S. Nos. 91 and 90 of 1920 on the file of the District Court), preferred against the decrees of the Court of the District Munsif of Karkal in O. S. No. 546 and 544 of 1918.

Exhibit V, the Mulgeni Chit was as follows :—

"The mulgeni chit, in respect to immoveable property executed and given on 14th September, 1894 to Shaik Beari, son of Moidin Beari, of Moplah caste, Ghat contractor, residing in Karniki Village, Puttur Magane, Mangalore Taluq, by Santabha Malya, son of Venkatesa Malya, Gowda Saraswat Konkan Brahmin, residing in the same village and Magane, is :—

I have given on mulgeni to you the property of Mule No. 24 with kadatalai in the name of Krishna Pai and with a beriz of Rs 9-4-10 in Karniki village, Puttur Magane, Mulki Sub-District, South Kanara District, which comprises Danamadi bahayat, house, batti, kottige, everything, lying within the boundaries mentioned below and for which on having obtained it for mulgeni from the said Krishna Pai as per the registered deed dated 3rd September 1892 I am paying gene ? therefor to him at the rate of Rs. 4-0-0 (in cash) and Mulkati Suggi kolke rice nija mudi 12 of 50 Holki, per year on fixing the one ? therefor at the rate of kuchige rice nija mudi 12 of 50 Holki and Rs. 19-0-0 in cash per year which you should pay to me within 30th of May every year commencing from 1895 and obtain a receipt therefor. In default of so paying the gene in time, should pay the same with interest at 12 per cent. on the value of the rice at the market rate for the time being and also on the cash amount from the date of default till payment. Henceforward when you make improvements plant and plantain plants and enjoy it through posterity in future there is no reason from or my representatives to say that a greater gene ? should be paid or that the property should be given up. If you do not require the improvements that may be made by you in the said property, you should give them to me alone after receiving from me their value as fixed by four respectable men but you should ? make sales, etc., thereof to any others.

This is the Mulgeni chit of immoveable property.

* * * *

B. Sitarama Rao for appellant.

S. T. Srinivasagopalachari for respondents.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—I desire to say not one word more than is necessary for the decision of this case, because I am free to admit that I do not understand what the judgment of their Lordships of the Privy Council in *Vidya*

Coutts Trotter, C J.

Venkatramana Pai v. Sampa.

Coutts Trotter, C. J.

Varuthi Thirtha v. *Baluswami Iyer* (1) enjoins upon us; but it appears to me that this much is clear that the real line of cleavage in this case is—Are we to treat this instrument as being absolutely clear and, therefore fettering us in its construction, or as something capable of passing a qualified estate in the property to the tenant ? It is quite common for persons in the position of trustees of religious and charitable endowments to make lease of such property, and the common current of decisions in this presidency has always been to recognise those as being valid for the life of the lessor or the trustee, or, what is equivalent to his life, his continuance in the trust and to construe words apparently wider in import as limited to the lifetime of the lessor *qua* trustee. That is what we propose to do here. There are no extravagant words in this instrument indicating a permanent lease such as mulgeni, etc., or other technical phrases of that import, and we think that the Courts should strive, where they can, to put a liberal construction upon the instrument *ut res magis valeat quam pereat* so as to uphold it and carry into effect the intention of the parties. That being so, no question of limitation arises, and we must reverse the decision of the Court below and give a decree to the plaintiff for possession of the suit land with mesne profits from the date of the District Munsif's decree at the rate awarded by him until possession is given. The Appeal is allowed with costs throughout.

There will be a similar decree in Second Appeal No. 411 of 1921.

Ramesam, J. :—I agree.

T. S. V. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD PHILLIMORE, LORD CARSON, SIR JOHN EDGE, MR. AMEER ALI AND MR. JUSTICE DUFF.

Bholonath Sen *Appellant**

v.

Balaram Das (since deceased), and others *Respondents.*

P. C.

Bholonath Sen v. Balaram Das.

Estoppel—Mortgagor and mortgagee—Mortgagor's title to mortgaged property—Denial by mortgagor—Permissibility.

In a suit to enforce a mortgage, the mortgagor is estopped from pleading that he has no title to the mortgaged property, and that therefore

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1. (1921) I L R 44 M 831 41 M L J 346.

*P C Appeal No. 189 of 1919, 14th July, 1922.

the decree in the suit must be a personal decree only, and not one for sale of the mortgaged property.

Appeal against the decree of the Calcutta High Court (5th June, 1917) varying a decree of the Subordinate Judge of the Fourth Court, 24 Parganas, dated the 29th May, 1914 (O. S. No. 128 of 1911).

E. B. Raikes for appellant.

Kenworthy Brown for respondents.

July 14, 1922. The Judgment of their Lordships was delivered by

Lord Phillimore.

LORD PHILLIMORE :—Their Lordships, having heard a full statement of the facts of the case, and everything that could be urged by learned Counsel for the appellant, are satisfied that the decree appealed from must stand.

There are, in fact, on final examination, but two points to be taken on behalf of the appellant. The first is that the decree ought to have been a personal decree only and not a decree as in a mortgage suit involving the mortgaged properties, the suggestion being that as the appellant had no title to any part of the mortgaged property, there ought not to be an order against the mortgaged properties. The answer is that it does not lie in his mouth to say so. He has professed to have an interest in this property, and whatever interest he may have had has been bound by the mortgage, and, as far as he is concerned, must be enforced against him.

The second point taken is that the decree ought only to have been made in respect of 4 annas of the property, and it has, in fact, been made against 16 annas. The answer to that is that those who say this have misconstrued the decree. There is no doubt something in the language of the learned Judge of the High Court who delivered the judgment which would look as if he so thought, and possibly, as against the appellant, if the Judge had so thought, it might have been said. that a decree had been passed against him in respect of any interest he might have in the 16 annas ; but, however that may be, when the decree came to be carefully drawn up, it is quite clear that it only affects the four annas.

These two points, therefore, fail and their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant *W. W. Box and Co.*

Solicitor for respondents : *Douglas Grant.*

Appeal dismissed.

PRIVY COUNCIL.

(On Appeal from the Court of the Judicial Commissioner of Oudh.)

PRESENT:—LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

Lal Ram Singh and others *Appellants** (*Plaintiffs*)

v.

Deputy Commissioner of Partabgarh *Respondents* (*Defendants*).

P. C.

Lal Ram Singh *v.* Deputy Commissioner of Partabgarh

Deed—Construction—Compromise agreement in nature of settlement—Estate in reversion—Grant of—Life-estate or absolute estate—Absolute estate—Grant of—Provisions derogating from—Legal incidents of grant—Mistake in statement as to—Effect—Heirs and representatives—Words of limitation or of purchase—Hindu Law—Will—Father—Bequest of self-acquired property to son—Nature of property in son's hands, ancestral or self-acquired—Mitakshara family—Deed—Construction—Maxim ut res magis valeat quam pereat*—Applicability—Oudh Estate—Succession—Rules applicable to—Transfer to person in line of succession but not immediate successor—Effect.*

H, the owner of a taluqdari estate, entered in List 2 of the Oudh Estates Act of 1869, compromised a suit brought by him against his grandson, *R,* which compromise was embodied in an agreement between the parties which again was confirmed by a decree of the Court. In compliance with that agreement, *H* executed an instrument (in the nature of a settlement) which provided that *H* should for his life be the proprietor in possession of one of the taluqdari estates; that he was to have no power to make a will, sale or transfer affecting the estate beyond his lifetime, that *R* was to have another estate similarly for his life only; and that on the death of *H, R* was to have the whole of the taluqdari estates, but again for his life only, except that he had power to make a certain provision for his widow or widows, sons and daughters.

The agreement further provided that if *R* predeceased *H, D,* the mother of *R,* was to have *R's* estate for life; that if both *D* and *R* died in the life of *H, H* was to have the absolute proprietary right with the power of making a will, sale or transfer in accordance with the authority given by the Act of 1869; that if, on the other hand, the order of deaths was that *H* died first, and then *R,* in that event, the mother was to be owner of the whole taluqdari estate for her life with similar restrictions. Cl. 7 of the agreement provided:—That on the death of the last three persons, *i. e., H, R,* and *D, L,* the second son of *H,* and his heirs and representatives, shall succeed to the entire estate, as provided by S. 22 of Act I of 1869. But the said *L* shall not interfere in any way with the said *ilaqa* beside the six villages which he has received under S. 8, during the lifetime of *R* and *D.*

H died first, then *D,* then *L,* and lastly *R,* who died without leaving a son.

Held that, in dealing with an instrument like the agreement (set out above) carrying out a decision of the Court, the Court ought to take for its guidance

*P C Appeal No. 104 of 1922. 3rd July, 1923.

P. C.

Lal Ram Singh *v.* Deputy Commissioner of Partabgarh.

the rule that, if possible, such a document should be construed, *ut res magis valeat quam pereat ;* and that, on the right construction of the agreement, *L* received an absolute estate in reversion, and he took the property as self-acquired property and could therefore dispose of it by will.

The words "heirs and representatives" in cl. 7 of the agreement are to be treated as words of limitation and not of purchase, that is, they are merely intended to express the absolute estate which it was proposed to give to *L* as distinguished from the life-estates which had preceded it. This being so, the later words in the sentence may be regarded either as an idle attempt to derogate from the grant previously made and therefore to be rejected, or, as words of description only, stating the legal incidents which the grantor conceived to belong to the estate which he had granted. In this case the mistake as to the legal consequences does not affect the grant which he has made.

Quaere Whether in a Mitakshara family self-acquired property of a father bequeathed to his son is to be deemed to be ancestral or self-acquired property in the son's hands ?

The property bequeathed to *L* was held to be self-acquired property in his hands because before *H* made the settlement, the property was subject to the Oudh Estates Act of 1869 and would have descended to a single heir in accordance with that Act and would not have descended according to Mitakshara Law or to those whom that law would designate as heirs.

Before the Amending Act of 1910, a transfer of a taluqdari estate in Oudh to a person who was not the immediate successor, even though that person was in the line of succession, operated to take the estate out of the special limitations of descent.

Appeal from a decree of the Court of the Judicial Commissioner (4th April, 1919) affirming a decree of the Subordinate Judge of Mohanlalganj.

Sir George Lowndes, K. C. and *Kenworthy Brown* for appellants.

De Gruyther, K. C., Wallach and *Dube* for respondents.

July 3, 1923. The Judgment of their Lordships was delivered by

Lord Phillimore.

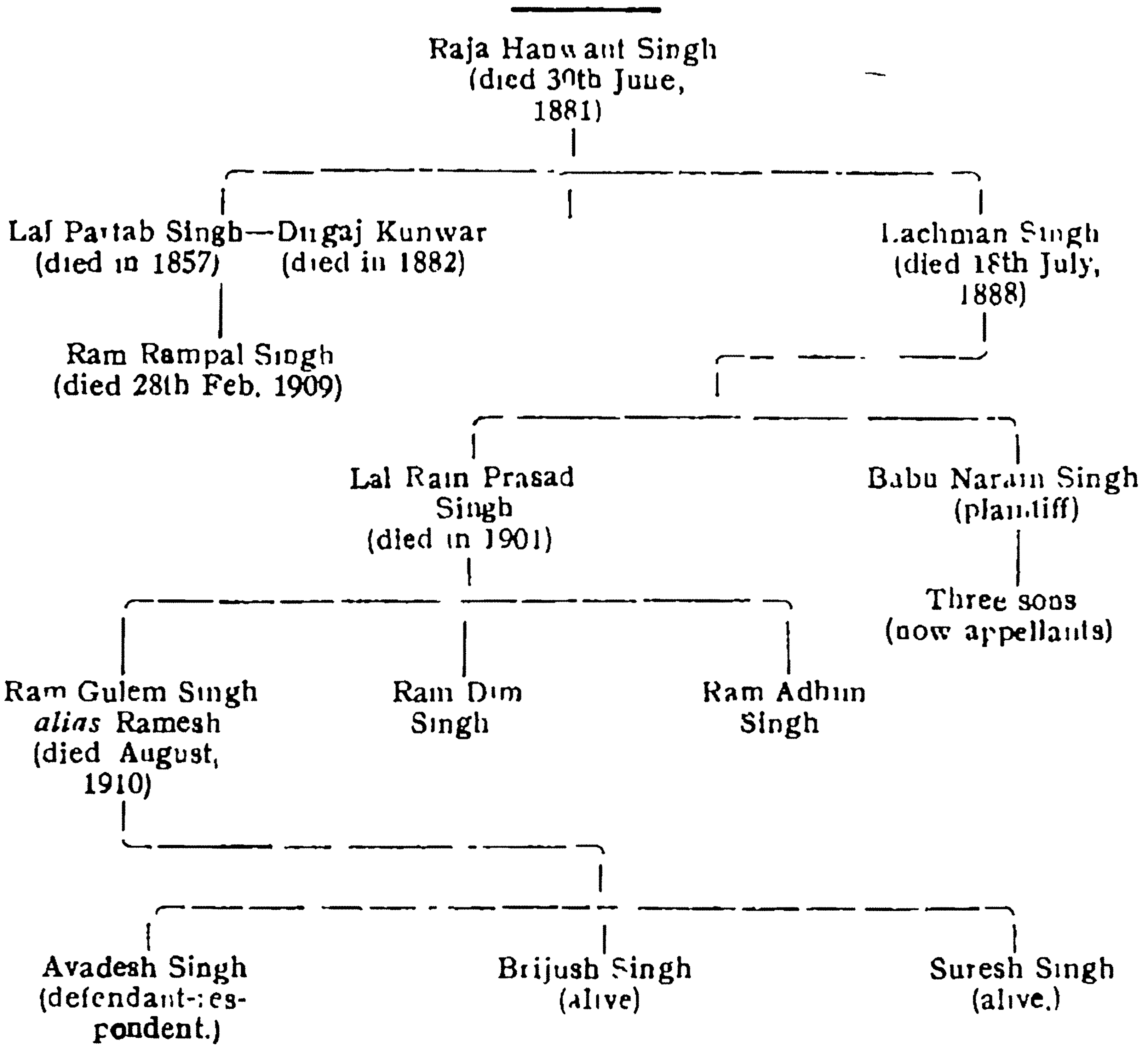
LORD PHILLIMORE :—The dispute in this case concerns the succession to a taluqdari estate in Oudh, which at the time of the confiscation was held by one Raja Hanwant Singh, the ancestor of all the parties. Their position would best be explained by a short pedigree.

P. C.

Lal Ram Singh v. Deputy Commissioner of Partabgarh.

Lord Phillimore.

PEDIGREE.



Narayan Singh, the original plaintiff, is dead, and his three sons take his place as the present appellants. The defendant-respondent being a minor, is represented by the Deputy Commissioner as Manager of the Court of Wards.

The occasion for the dispute arose upon the death of Ram Rampal Singh in 1909, on which occasion Ram Gulem Singh claimed the estate and procured mutation of names in his favour. He did not live long and was succeeded by the minor, whose interest is represented by the Manager of the Court of Wards. In 1913, the plaintiff, Narain Singh, brought the present suit to dispossess him.

The estate is one of those governed by the Oudh Estates Act, 1869, and is in List 2, defined by the Act as "A list of the taluqdars whose estates according to the custom of the family on and before the thirteenth day of February, 1856, ordinarily devolved upon a single heir."

Hanwant Singh, before he received his sanad, had executed a deed of gift in favour of his grandson, Rampal Singh, of all his properties, except six villages. Disputes having

P. C.

Lal Ram Singh v. Deputy Commissioner of Partabgarh.

Lord Phillimore.

arisen as to the nature and operative effect of the gift, the Raja, on the 16th of May, 1871, filed a suit against Rampal Singh in the Court of the Deputy Commissioner of Sultanpur, praying for a declaration of his absolute proprietary right, notwithstanding the execution of the deed of gift.

The grandson appeared and defended the suit ; and thereupon a compromise was arrived at, which was embodied in an agreement between the parties, which again was confirmed by a decree of the Court. In compliance with that agreement Hanwant Singh executed an instrument which may not inappropriately be called a settlement. This document provided that Hanwant Singh should for his life be the proprietor in possession of one of the taluqdari estates. He was to have no power to make a will, sale or transfer affecting the estate beyond his lifetime. Rampal Singh was to have another estate similarly for his life only. On the death of Hanwant, Rampal was to have the whole of the taluqdari estates, but again for his life only, except that he had power to make a certain provision for his widow or widows, sons and daughters.

If Rampal Singh predeceased Hanwant Singh, Dirgaj Kunwar, mother of Rampal Singh, was to have Rampal's estate for her life. If both she and Rampal Singh died in life of Hanwant Singh, Hanwant was to have the absolute proprietary right with the power of making a will, sale or transfer in accordance with the authority given by the Act of 1869. If, on the other hand, the order of deaths was that Hanwant Singh died first, and then Rampal Singh, in that event the mother was to be owner of the whole taluqdari estate for her life with similar restrictions. Then came the last limitations which are the important ones in this case. The actual settlement was drawn up and executed in Urdu, and the official translation of this paragraph is as follows :—

"7. That on the death of the last three persons, *i. e.*, Raja Hanwant Singh, Raja Rampal Singh and Dirgaj Kunwar, the mother of Raja Rampal Singh, Babu Lachman Singh, the second son of Raja Hanwant Singh, and his heirs and representatives, shall succeed to the entire Rampur Kaithaula estate, as provided by S. 22 of Act I of 1869. But the said Babu Lachman Singh shall not interfere in any way with the said *ilaqa,* beside the six villages which he has received under S. 8, during the lifetime of Raja Rampal Singh and his mother, Dirgaj Kunwar."

As the pedigree shows, Hanwant Singh died first, then the mother, then Lachman Singh, and lastly Rampal Singh,

P. C.

Lal Ram Singh v. Deputy Commissioner of Partabgarh.

Lord Phillimore.

upon whose death it became necessary to determine who succeeded to the reversion. Rampal Singh seems to have died without leaving a son, but if he had left sons, they would have been excluded.

Now S. 15 of the Act of 1869 provides as follows :—

"If any taluqdar or grantee shall heretofore have transferred or bequeathed, or if any taluqdar or grantee, or his heir or legatee, shall hereafter transfer or bequeath, to any person not being a taluqdar or grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transfer of, and succession to, the property so transferred or bequeathed shall be regulated by the rules which would govern the transfer of, and succession to, such property if the transferee or legatee had bought the same from a person not being a taluqdar or grantee."

This transaction took place before the amending Act of 1910 ; so that a transfer to a person who is not the immediate successor, even though that person be in the line of succession, operates to take the estate out of the special limitations of descent. The principle has been finally established by the case of *Ghulam Abbas Khan* v. *Amatul Fatima* (1).

In these circumstances the original plaintiff Narain Singh, the father of the present appellants, claimed to succeed to the whole estate under the Mitakshara Law of the Benares School, or alternatively under a will executed by Lachman Singh ; and the original defendant Gulem Singh *alias* Ramesh set up as defences that the deed of settlement was invalid, that the plaintiff was estopped under the principle of *res judicata,* that the estate was impartible, that he was the heir according to the custom of the tribe or family, which he said was the custom of lineal primogeniture, that the alleged will of Lachman Singh was fictitious, and that in any event, Lachman Singh had no power to dispose of the taluqdari estate by will. Fortunately for him, though he did not rely upon it at the time as a defence, he introduced among the documents which he filed, a will of Lachman Singh in his favour. In the event he got a decision from the Subordinate Judge in his favour on the points of *res judicata,* and the family custom of lineal primogeniture— the Subordinate Judge further holding that the plaintiff had not proved the will of Lachman Singh on which he relied.

The case then came on appeal to the Court of the Judicial Commissioner. Here the learned Judges agreed with the

1. (1921) I L R 43 A 297 L R 48 I A 135 40 M L J 577.

P C.

Lal Ram Singh *v.* Deputy Commissioner of Partabgarh.

Lord Phillimore

Subordinate Judge that the will upon which the plaintiff relied had not been proved. But they disagreed with him in his decision as to *res judicata* and the family custom, which latter they held not to be proved. Nevertheless, they decided in the defendant's favour because they held, contrary to his original submission, that Lachman Singh could validly dispose of his property by will, he having, according to their views, an absolute estate in reversion and not a life estate only. Having thus allowed the defendant to reverse his original position to so large an extent, they, as it seems to their Lordships, very properly gave him a decision without costs.

On appeal to this Board the heirs of the original plaintiff, while not abandoning their father's position that he was entitled as next heir either to Hanwant Singh or to Lachman Singh to the whole property, have also put forward a claim that the two sons of Lachman Singh were both of them heirs, and that they, as representing one of these sons, should have half the property.

Now, for this purpose they had to abandon the original case, which was that Lachman Singh could dispose of the property by will and had disposed of it in their father's favour. On the contrary they now say that he had only a life-estate and could not, in any event, pass the property by will.

In this tangle of claims and defences, it appears to their Lordships that the points which now remain to be decided are these :—

1. What estate or interest did Lachman Singh take under the settlement? If he took only a life-estate, then the reversion descended to the heir or heirs of Hanwant Singh. If he took an absolute estate, then—

2. Had he the power to dispose of it by will ? And this question raises a new point which was not discussed in the Courts below. If he could not dispose of it by will, then—

3. Who are his heirs ? In connection with this point, it would have to be decided whether the estate in Lachman's hands was partible or impartible.

Now as to the first point, it was strongly contended on behalf of the appellant, that the right way to read clause 7 was to read it as an endeavour to fix the course of succession in the line prescribed by S. 22 of the Act of 1869, though the effect by virtue of S. 15 would be to take the estate out of the Act ; and that, therefore, this was an attempt to create an order of succession unknown to the common law and unwarranted by the Act, which has been decided to be impossible by the

P. C.

Lal Ram Singh v. Deputy Commissioner of Partabgarh.

Lord Phillimore.

judgment in the *Tagore Case* [*Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (2)], and by various subsequent decisions.

It followed (so the argument proceeded) that the limitations were good so far as they gave Lachman a life estate, but that everything after this must be rejected as contrary to law, and that therefore the reversion to the estate after the death of Lachman remained undisposed of.

It was also submitted that the point might be put in this way; the grant of a life estate to Lachman would not—supposing him to be out of the line of succession—necessarily operate under S. 15 as a destruction of the special taluqdari entail, and the settlement would anyhow be effective so far as it granted that life estate, but the transfer of the absolute ownership would operate, under S. 15, to break the taluqdari entail, and would therefore subject the property to the ordinary Hindu Law of inheritance to which the taluqdari entail would be repugnant, and that therefore the further limitation by reference to S. 22 of the Act would be invalid and inoperative. Another suggestion was that the clause should be read as giving a life estate to Lachman and then the reversion to his heirs, who being unborn persons, could not take under Hindu Law.

The words in cl. 7 are undoubtedly difficult of construction ; but their Lordships, in dealing with an instrument of this kind carrying out a decision of the Court, ought to take for their guidance the rule that, if possible, such a document should be construed, *ut res magis valeat quam pereat*.

On the whole, their Lordships are disposed to accept the construction which the Subordinate Judge and the appellate Court put upon this clause of the settlement. In the first place they think that, to borrow a phrase from the English Law of Real Property, the words " heirs and representatives " are to be treated as words of limitation and not of purchase, that is, that they are merely intended to express the absolute estate which it was proposed to give to Lachman as distinguished from the life-estates which had preceded it. This being so, the later words in the sentence may be regarded either as an idle attempt to derogate from the grant previously made and therefore to be rejected, or as words of description only, stating the legal incidents which the grantor conceived to belong to the estate which he had granted. In this case his mistake as to the legal consequences does not affect the grant which

2. (1872) 9 Beng L R 377 (P C).

P. C.

Lal Ram Singh v Deputy Commissioner of Partabgarh.

Lord Phillimore.

he has made. They think, therefore, that Lachman received an absolute estate in reversion.

The next point for consideration is whether Lachman could dispose by will of the estate, which was vested in him. This depends upon the question whether it was to be deemed ancestral property or self-acquired property. On this point their Lordships have little assistance from the Courts below. It could not have been considered by the Subordinate Judge, because the respondent was not then relying on Lachman's will. It probably was not argued before the appellate Court because counsel for the appellant had so little opportunity of addressing himself on this new point. But the appellate Court, though without giving any reasons for it, did incidentally state its opinion that the property was self-acquired property.

It appears that there has been great diversity of opinion in the High Courts in India as to the effect in a Mitakshara family of a bequest made by a father of property which in the father's hands was self-acquired, to his son. In Calcutta, in 1863, the first point arose in the case of *Muddun Gopal* v. *Ram Buksh* (3) when it was held that such property would be ancestral, and this has been followed in the later case of *Hazari Mall Babu* v. *Abaninath Adhurjya* (4). In Madras, upon the whole, the view seems to be that the father can determine whether the property which he has so bequeathed, shall be ancestral or self-acquired, on the principle of *cujus est dere ejus est disponere,* but that unless he expresses his wish that it should be deemed self-acquired, it is ancestral. See *Tara Chand* v. *Reeb Ram* (5) and compare it with *Nagalingam* v. *Ramachandra* (6) and other cases. In Bombay, on the other hand, the principle of intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention it is deemed self-acquired. See *Jugmohandas* v. *Sir Mangaldas Nathubhoy* (7) and *Nanabhai* v. *Achratbai* (8). At Allahabad the decision was that such property is self-acquired. See *Parsotam* v. *Janki Bai* (9). Finally, in Oudh, in the case of *Rameshar* v. *Mussammat Rukmin* (10) after a review of all the cases, it

3. (1863) 6 W R 71.
4. (1912) 17 C W N 280.
5. (1866) 3 M H C R 50. 6. (1901) I L R 24 M 429 11 M L J 210.
7. (1886) I L R 10 Bom 528. 8. (1886) I L R 12 Bom 122
9. (1907) I L R 29 All 354. 10. (1909) 14 O C 244.

P. C.

Lal Ram Singh v. Deputy Commissioner of Partabgarh.

Lord Phillimore.

was held that "Where self-acquired property is bequeathed to sons, in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, it should be presumed that each son takes an interest which passes to his heirs at his death."

If the criterion were to be the intention of the father when he makes the gift, there is nothing to indicate that Hanwant Singh desired to make the estate ancestral property in the hands of Lachman. His expression of opinion or desire, whichever it may be, that the property should still be governed by the Act of 1869 would indicate the contrary view because under the Act each holder of the estate has a power to give it or will it away. If, on the other hand, Hanwant should be treated as having intended the legal consequences of his acts, he had brought the estate under S. 15 ; and then the argument urged by the Counsel for the respondent founded on the words at the end of that section by which property is to be regulated by the rules which would govern succession to it, if the transferee or legatee had bought it, would have to be considered.

But their Lordships deem it unnecessary to pronounce upon these points. It may be that some day this Board will have to decide between the conflicting decisions of the Indian High Courts, and it may be that when this time comes, this Board will prefer to go back to the original text of the Mitakshara and put its own construction upon that text. It is not necessary to do so in this case.

The principle upon which it is contended that such property should be deemed ancestral property, is that the son is only getting by his father's will that which, but for the will, he would have received by descent according to the Mitakshara Law. Now before Hanwant Singh made the settlement, the property was subject to the Act of 1869 and would have descended to a single heir in accordance with that Act, and would not have descended according to Mitakshara Law or to those whom that law would designate as heirs. The principles, therefore, of Mitakshara Law—if that law be as the High Court of Calcutta has thought and the appellant contends—would not apply to regulate the descent. Lachman, therefore, took the property as self-acquired property and could dispose of it by will.

P C.

Lal Ram Singh v. Deputy Commissioner of Partabgarh.

Lord Phillimore.

It becomes, therefore, unnecessary to consider who would be the heir or heirs of Lachman if he had died intestate.

In the result, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *Watkins* and *Hunter*.

Solicitor for respondents : *Solicitor, India Office.*

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Kajuluri Swami and another *Petitioners**

v.

Sree Rajah Chintalapati Sooryanarayana Razu Bahadur Garu *Respondent.*

Kajuluri Swami v. Sooryanarayana Razu.

Civil Procedure Code, O. 9, R. 9—Execution proceedings —Applicability to—Execution sale—Petition to set aside—Dismissal for default—Application under O. 9, R. 9, to restore application—Maintainability.

O. 9, R. 9, Civil Procedure Code, does not apply to orders passed in execution proceedings. *Held,* that a petition for setting aside an execution sale which has been dismissed for default cannot be restored on an application made under O. 9, R. 9.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Cocanada in Civil Miscellaneous Petition No. 2 of 1922 in Original Suit No. 441 of 1904.

P. Somasundaram for petitioners.

D. Appa Rao for respondent.

The Court delivered the following

Jackson, J.

JUDGMENT :—This is a Civil Revision Petition under S. 115, Act V of 1908 and S. 107, Government of India Act.

Petitioner applied under O. 9, R. 9 to restore his petition for setting aside an execution sale which had been previously dismissed for default. The lower Court has dismissed the application on the ground that such an application does not

* C R P No. 881 of 1922. 6th March, 1924.

Kajuluri Swami v. Sooryanarayana Razu

Jackson, J.

lie against orders in execution proceedings following *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (1). Hence this petition.

The Patna Bench has ruled in terms that O. 9, R. 9 does not apply, and the question is whether this ruling should be followed with special reference to *Subbiah Naicker* v *Ramanathan Chettiar* (2) the Madras ruling to the contrary. In the Madras ruling at p. 475, the following passage occurs: "It is contended that O.9,R.13,Civil Procedure Code, does not apply to *ex parte* orders passed in execution but only to *ex parte* decrees in suits. We think that that argument cannot be accepted. Orders in execution which come under S. 47, Civil Procedure Code, are decrees as defined in S. 2 of the Code and hence *ex parte* orders passed in execution are *ex parte* decrees. O. 9, R. 13 provides generally for the setting aside of *ex parte* decrees and not only for the setting aside of those classes of *ex parte* decrees which are not also orders passed under S. 47 in execution proceedings.

This line of reasoning is traversed in *Chidambaram Chetty* v. *Theivanai Ammal* (3). " It is now pointed out with some force that although this may justify the application of Art. 164 (Indian Limitation Act) it is no answer to the consideration that the whole order including R. 13 is applicable in terms only'to suits and therefore it is to be inferred to the description of decrees passed in them." I agree and I think this criticism warrants the observation in the Patna Case that *Subbiah Naicker* v. *Ramanathan Chettiar* (2) does not rest upon a sure foundation(page 139).Oldfield, J., in his referring judgment in *Chidambaram Chetty* v. *Theivanai Ammal* (3), quoted above, proceeds that a better foundation for the ruling in *Subbiah Naicker* v. *Ramanathan Chettiar* (2) would be the plain and unrestricted terms of S. 141, Civil Procedure Code. This refers to the argument that under S. 141 the procedure in regard to suits is made applicable to all proceedings, and therefore O. 9 is applicable to execution proceedings. But this is the very point taken in *Balasubramania Chetty* v. *Swarnammal* (4) and it was held with special reference to *Thakur Prasad* v. *Fakirullah* (5) that a suit includes proceedings in execution and the word ' suit ' in S. 141 must therefore be understood as including execution. And therefore of course the

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1. (1918) 4 Pat L J 135. 2. (1914) I L R 37 M 462 : 26 M L J 189.
3. (1923) I L R 46 M 768 : 45 M L J 346.
4. (1913) I L R 38 M 199 : 25 M L J 367. 5. (1894) I L R 17 A 106 (P C).

other proceedings referred to S. 141 would not refer to execution proceedings which fall within the term 'suit' in that section. This removes the last prop to *Subbiah Naicker* v. *Ramanathan Chettiar* (2) and I cannot hold that it is an authority for disputing the ruling in *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (1). And as regards authority outside Madras it is only necessary to refer to the observation in *Thakur Prasad* v. *Fakirullah* (5) that the proceedings spoken of in S. 647 (now S. 141, Civil Procedure Code) do not include executions. The order of the District Munsif is correct. The petition is dismissed with costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE RAMESAM, AND MR. JUSTICE WALLACE.

Bolla Guruvayya and others *Appellants* (Defts.)*

v.

Cherukuri Venkatarathnam *Respondent (Plaintiff).*

Registration Act, S. 77—Scope of enquiry by Court—Duty of Registration Officer when documents are presented.

When a document is presented to a Registrar of Assurances for registration and it bears on its face signs of having been tampered with, he has only to answer the question whether the document is in the state in which it was executed by the parties to it. He would be exceeding his functions if he went into a roving enquiry to guess at the probabilities of its provisions ; and in a suit under S. 77, Registration Act, the same considerations should guide the Court which should guide the Registrar in considering his duty to register or to refuse registration.

Appeal under clause 15 of the Letters Patent against the judgment of Mr. Justice Phillips, dated 19th February, 1923 and passed in Appeal No. 300 of 1921 preferred against the decree of the District Court of Kistna at Masulipatam in O. S. No. 17 of 1920.

K. Krishnamachariar for appellants.

N. Rama Rao for respondent.

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1. (1918) 4 Pat L J 135. 2. (1914) I L R 37 M 462 : 26 M L J 189.
5. (1894) I L R 17 A 106 at 111 (P C).

*L P Appeal No. 6 of 1923. 10th April, 1924.

Bolla Guruvayya v. Venkatarathnam

Coutts, Trotter, C. J.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This was a suit brought under S. 77 of the Indian Registration Act which enables a person who has tendered a document for registration to bring a suit in a Civil Court against the refusal of the Registrar to register it.

In this case the plaintiff tendered a document, which is before us, for registration. The document bears the most apparent traces of having been tampered with. In one sheet all the glaze of the paper has been destroyed and there is a very deep discoloration. Others bear obvious signs of the surface of the paper having been chemically dealt with but throughout although the discoloration is marked, in the operative sheets of the document, the signature, which is admitted, and the stamp paper at the top are practically intact. Expert evidence has shown that the discoloration and the destruction of the glaze on the surface of the paper is due to chemical action. The inference that those alterations were made after the execution of the document in its original state by the defendants is almost irresistible. Naturally enough the plaintiff was asked what explanation he proposed to offer. The one he gave was so childish that hardly any of the learned Judges who considered this matter have treated it seriously. That being so, what is the position ? Is this Court to enter into a roving enquiry into the probabilities and the surrounding circumstances and put itself the question—Does this document, whatever its history, represent the substance of the agreement between the parties ? In my opinion, that is a wholly otiose and irrelevant enquiry. The Registrar has got to ask himself merely this Is this document now tendered to me to be registered actually in the state in which it was executed by the parties to it ? In my opinion, he would be exceeding his functions if, he went into a roving enquiry to guess at the probabilities of its provisions ; and it appears that, in a suit under S. 77, the same considerations should guide the Court which should guide the Registrar in considering his duty to register or to refuse registration. Indeed, were it otherwise, the Court would be called upon to say, in effect that the Registrar was perfectly justified in refusing registration, but that the Court will nevertheless order it to be registered ; and the result might be that the Court would order registration of the document which had been altered behind a back of the person who executed it and after its execution and signature on the ground not that he had ever executed

it in its present state, but that it represented what had actually been agreed between the parties. In my opinion, such a conclusion is so absurd as to refute itself.

Bolla Guruvayya v Venkatarathnam. — Coutts Trotter, C. J.

The appeal must be allowed and the suit dismissed with costs throughout.

I may add that, if the facts were as the plaintiff contends, namely, that, although he has tampered with the document, the agreement was that which he contended to be, he has a remedy other than by proceeding under this Act, or at any rate he had, though perhaps by now he may have lost it by limitation.

If the impugned document has been registered in pursuance of the order of the District Judge—and we are given to understand that it has—the registration stands cancelled. This order will be communicated to the Registrar of Kistna District.

Ramesam, J. :—I agree.

Wallace, J. :—I agree and have nothing to add.

T. S. V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

Vasireddi Sriramulu *Appellant** (*1st Defendant*)

v.

Putcha Lakshminarayana *Respondent* (*Plaintiff*).

F. B — Vasireddi Sriramulu v. Putcha Lakshminarayana.

Civil Procedure Code, O. 32, R. 4 (3)—Appointment of guardian for a suit—Consent of proposed guardian—Whether must be expressed—Want of consent by proposed guardian, whether renders the decree in the suit a nullity.

Held, by the Full Bench (the Chief Justice, Ramesam and Wallace, JJ.), that the consent of a proposed guardian *ad litem* under O. 32, R. 4 (3) of the Civil Procedure Code need not necessarily be express.

Consent is a question of fact ; it is a question to be decided upon evidence whether there was consent by the person proposed that he would act as guardian.

Held by Phillips, J. (Venkatasubba Rao, J., dissenting) The absence of consent on the part of a proposed guardian *ad litem* does not render the decree

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*Appeal No. 101 of 1921. 9th April, 1924.

F. B.

Vasireddi Sriramulu v Putcha Lakshmi-narayana.

a nullity, but is merely an irregularity which would vitiate the decree only if it has affected the merits of the case.

Per Venkatasubba Rao, J. A decree passed against a minor where there is no consent on the part of the guardian *ad litem* to act as such, is a nullity; and it is unnecessary to set it aside in a separate proceeding.

Appeal preferred against the decree of the Court of the Second Additional Subordinate Judge of Guntur, dated 15th November, 1920, in O. S. No. 72 of 1919.

The Court (Phillips and Venkatasubba Rao, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Phillips, J.

Phillips, J. :—The plaintiff brings this suit for a declaration that the decree obtained against him by the 1st defendant in O. S. No. 72 of 1916 in the Temporary Sub-Court, Guntur, is not valid and binding on him. This decree was passed against the plaintiff when he was a minor, and he was represented in that suit by his natural father as guardian. It has in many cases been held that unless a guardian *ad litem* consents to his appointment as such, the appointment is invalid. This is based on the assumption that the provision of O. 32, R. 4 (3), Civil Procedure Code, that " no person shall without his consent be appointed guardian for the suit " is mandatory. In many of these decisions in referring to the consent of the guardian, the words " express consent " have been used, and it is argued that the consent of the guardian must be " express " and cannot be implied ; but although this word " express " has been repeatedly used, as in *Narendra Chandra Mandal* v. *Jogendra Narayan Roy* (1) and *Mohan Krishna Dar* v. *Har Prasad* (2), the question as to whether the consent should be express or implied was not under consideration, and certainly the wording of cl. (3) does not contain the word " express. " As it is stated " that no person shall without his consent be appointed guardian " it appears to me clear that the appointment may be made when the person does consent ; and unless it is otherwise provided a consent may always be express or implied, and consequently there appears to be no provision in R. 4 (3) that the consent must be express. In fact, in an unreported case of this Court, S. A. Nos. 836 and 850 of 1922, it was held that the consent might be implied. It was also

1. (1914) 19 C W N 537. 2. (1917) 40 I C 11.

F. B.

Vasireddi Sriramulu v. Potcha Lakshmi-narayana

Phillips, J.

held in *Chhattar Singh* v. *Tej Singh* (3) and *Thakur Tajeswar Dutt* v. *Lakhan Prasad Singh* (4), that the consent may be implied ; in fact, in the latter case it was held that where the certificated guardian, the mother of the minor, was served with notice that it was proposed to appoint her the guardian *ad litem* of her son and no objection was taken by the mother, the Court might properly assume that the mother had no objection to the proposed appointment, and that she in fact consented thereto. Taking it, therefore, that an implied consent is sufficient we have to decide whether in the present case there was such a consent. The plaintiff was an adopted son and his adoptive mother was acting as his guardian ; but the plaintiff, in O. S. No. 72 of 1916, put in a petition for the appointment of the natural father as guardian on the ground that the natural father had filed a guardian petition in the District Court stating that the adoptive mother was not acting properly on behalf of the minor and requesting that she might be removed from guardianship. Notice was accordingly taken out to the natural father, and after two attempts, it was served personally upon him. The notice reads as follows " The plaintiff has filed a petition stating that you have no interest adverse to that of the said minor and requesting that you may be appointed guardian for conducting the suit proceedings ; so, you should appear either in person or through a vakil and inform if you have any objection to being appointed guardian." The return on this notice was as follows " The defendant mentioned in this order being a minor his natural father and guardian has affixed his signature and received a copy of the notice in Guntur village on 7—9—1916" ; and there is another endorsement signed by the natural father, namely, " As this order was shown to me, the guardian-defendant mentioned in this order, in Guntur village on 7th September, 1916, and a copy of the notice to minor sent with it was given to me, I have received it." The proposed guardian did not appear in Court and allowed the proceedings to be conducted *ex parte*. Considering the fact that this natural father had applied to the District Court to be appointed guardian of the minor and for the removal of his adoptive mother from her guardianship it is clear that he was acting in the interests of his natural son ; and when he received this notice calling upon him to take any objection that he had to his appointment as guardian and he failed to appear in Court, it may be taken that he did

3. (1920) I L R 43 All 104.

4. (1922) I L R 2 Pat 296.

F. B

Vasireddi Sriramulu v. Putcha Lakshminarayana.

Phillips, J

consent to such appointment, but had no case to present to the Court. I would from these circumstances infer that the father consented to his appointment as guardian and consequently the decree obtained against the minor, who was properly represented in the suit, is *prima facie* binding on him.

As my learned brother is not prepared to hold that the guardian has been appointed with his consent it becomes necessary to consider the further question whether the decree obtained against the minor is invalid because he was not properly represented in the proceedings. It has been held in many cases that, where a guardian has not consented to his appointemnt as such, the minor is not properly represented and the decree is a nullity so far as he is concerned. This view has been consistently held in Calcutta—vide *Dinabandhu Nandi* v. *Mashuda Khatun* (5), *Ananda* v. *Upendra* (6), *Umapati Samanta and others* v. *Sheikh Masietulla* (7), *Baneswar Pramanik* v. *Tarapada Bhattacharjee* (8) and *Narendra Chandra Mandal* v. *Jogendra Narayan Roy* (1). The same view is taken in the Allahabad Court in *Hanuman Prasad* v. *Muhammad Ishaq* (9) in the Patna Court in *Mohan Krishna Dar* v. *Har Prasad* (10) and *Sheikh Sajjad Husain* v. *Sakal Rai* (11) ; and in the Punjab Court in *Hira Singh* v. *Ghulam Qadir* (12). The same view has been taken in this Court in an unreported case, L. P. A. No. 3 of 1913, and also in *Sharoof Sahib* v. *Raghunatha Sivaji* (13) and *Eda Punnayya* v. *Jangalu Rama Kotayya* (14). A different view was, however, taken in *Oodayanasamy Tevar* v. *Alagappa Chetty* (15) and in *Kuppuswami Aiyangar* v. *Kamalammal* (16). The question has been considered by the Privy Council. I do not consider that the two cases cited for reference, viz., *Rashid-un-nisa* v. *Muhammad Ismail Khan* (17) and *Partab Singh* v. *Bhabuti Singh* (18) are applicable to the present case. In the former case a married woman was appointed guardian and in law such an appointment could not be recognised and consequently the minor was deemed to be unrepresented. In the

5. (1912) 16 C L J 318.
6. (1921) 34 C L J 293.
7. (1922) 37 C L J 496.
8. (1917) 41 I C 872.
9. (1905) I L R 28 All 137.
10. (1917) 40 I C 2.
11. (1922) I L R 2 Pat 7.
12. (1918) 48 I C 399.
13. (1915) 18 M L T 401.
14. (1920) M W N 1.
15. (1903) 14 M L J 342.
16. (1920) I L R 43 M 842 39 M L J 375.
17. (1909) I L R 31 All 572.
18. (1913) I L R 35 All 487.

F B.

Vasireddi Sriramulu v. Putcha Lakshminarayana

Phillips.

second case it was found that the guardian had been appointed fraudulently and on that ground it was held that there was no proper representation.

The leading case on the point is the decision of the Privy Council reported in *Walian* v. *Banki Behari Pershad Singh* (19), where it was held that, although no formal order appointing the mother as guardian had been drawn up, the minors were effectively represented in the suit. It appears that in that case the mother was described as guardian in the plaint and also in the decree but that the record contained no formal order of appointment. The mother did not appear in Court and an *ex parte* decree was passed. This would seem to be conclusive on the point, but this case has been distinguished in the Calcutta Court on the ground that in that case the mother actually represented the minor in the proceedings and therefore it was a proper representation. This distinction appears to have been drawn owing to an erroneous view of the facts and I would point out that at least in one case *Ananda* v. *Upendra* (6), Mukerjee, J., remarked that in *Banki Behari Pershad's Case* (19) the mother who had been proposed as guardian for the minor son " had entered appearance and acted throughout the trial of the suit. " This does not appear to be a correct statement of the facts of that case, and a similar mistake has been made in *Hanuman Prasad* v. *Muhammad Ishaq* (9), where it is remarked that the mother in *Banki Behari's Case* (19) did appear in Court and the same mistake appears to underlie several of the other decisions. This has been pointed out by Das, J., in a very recent case in the Patna High Court reported in *Pande Satdeo Narain* v. *Ramayan Tewari* (20), where, after a very carefully reasoned judgment he comes to the conclusion that where, on the face of the record, a person qualified to act as the guardian appears as a guardian of the minor for the suit, the Court has no power in another suit brought for the purpose of impeaching the validity of the decree to examine the evidence in order to see whether notices under O. 32, R. 3 (4) were in fact served, or whether the person nominated as guardian did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit,unless it is shown that the defect in following the rules has affected the merits of the case ; but

6. (1921) 34 C L J 293.
9. (1905) I L R 28 All 137.
19. (1903) I L R 30 Cal 1021.
20. (1923) I L R 2 Pat 335.

F. B.

Vasireddi Sriramulu *v.* Putcha Lakshminarayana

Phillips, J.

where the record on the face of it shows that the minor was not represented by a guardian for the suit or was represented by a guardian disqualified under the express provisions of the statute from acting as guardian, the position is the same as if the minor was not a party to the suit. In this case the lower Court acting on the decisions in *Eda Punnayya* v. *Jangalu Rama Kotayya* (14). *Sharoof Sahib* v. *Raghunatha Sivaji* (21) and *Baneswar Pramanik* v. *Tarapada Bhattacharjee* (8) has held that, inasmuch as the guardian's consent was not obtained, the decree against the minor was a nullity, and consequently has not determined the further issue as to whether the guardian in that suit was guilty of gross and culpable negligence.

As I have pointed out, there is abundant authority to support this finding, but inasmuch as there is authority to the contrary and I personally respectfully agree with Das, J., in his judgment and consider that a number of decisions to the contrary are based on a misinterpretation of *Walian* v. *Banki Behari Pershad Singh* (19). I think it is advisable that the question should be considered by a Full Bench of this Court. The whole question and all the authorities have been most elaborately discussed in Das, J.'s judgment in *Pande Saideo Narain* v. *Ramayan Tewari* (20) and therefore it seems unnecessary in a mere reference to traverse the same ground again. I would only say that I respectfully agree with the conclusions arrived at by Das, J., and I think considerable weight must be attached to the judgment, for in it he has resiled from the earlier view taken by him in *Sheikh Sajjad Husain* v. *Sakal Rai* (11). I would therefore refer the following questions for the opinion of the Full Bench :—

1. Whether, where a person has been appointed guardian *ad litem* for a minor but his consent to such appointment has not been obtained, the decree is a nullity or whether it is merely voidable on good ground being shown therefor ?
2. Whether the consent of a guardian to his appointment as such must be express or may be implied ?

Venkatasubba Rao, J.

Venkatasubba Rao, J.—Two questions arise in this appeal. First, whether the appointment of a guardian *ad litem* may be

8. (1917) 41 I C 872.
11. (1922) I L R 2 Pat 7.
14. (1920) M W N 1.
19. (1903) I L R 30 Cal 1021.
20. (1923) I L R 2 Pat 335.
21. (1915) 29 I C 579.

F. B.

Vasireddi Sriramulu v. Putcha Lakshminarayana.

Venkatasubba Rao, J.

validly made without his express consent. Secondly, whether a decree passed without a guardian *ad litem* on the record who has consented to act is a nullity or is merely voidable.

In regard to the first question, the terms of O. 32, R. 4, Code of Civil Procedure, must be considered. Clause (3) says "No person shall without his consent be appointed guardian for the suit." Clause 4 is to the effect that where there is no other person fit and willing to act as guardian, the Court may appoint any of its officers to be such guardian.

The contention that the words "without his consent" are equivalent to "against his will" seems to me utterly unsound and I reject it without further discussion.

Then it is said that consent need not be express but may be implied. I am not prepared to accept this view. In considering whether a person is willing to act under cl. (4), is the Court to act merely upon inference from circumstances? or again is the Court to take evidence regarding the state of mind of the proposed guardian and is the duty cast upon the Court of finding as a fact that the guardian is willing to act although he has not expressed his willingness? In my opinion, it was not the intention of the legislature that the Court should, in each individual case, upon a careful scrutiny of facts and circumstances, come to the conclusion that the proposed guardian is willing to act. The usefulness of the rule contained in cl. (3) will be greatly diminished by adopting any such construction. The question whether the guardian has consented or not will generally not arise when the guardian subsequently appears and does any act on behalf of the minor. Therefore, whether consent could be implied has very often to be determined with reference to the facts existing at or before the appointment. I find it difficult to imagine the nature of the evidence that can be given either to support or repel the inference that there was consent. Is the fate of a case involving large issues to depend upon the determination of a question of fact on evidence necessarily interested and very often perjured, adduced, as is inevitable in a large majority of cases after a long lapse of time from the date of the appointment? The reason of the thing and the language of the section alike demand that consent to be valid must be express. There is abundant authority for this position and it is sufficient to refer to the judgment of Mukerjee and Panton, JJ., in *Ananda* v. *Upendra* (6). The learned

6. (1921) 34 C L J 293 65 I C 18.

F. B.

Vasireddi Sriramulu v. Putcha Lakshmi-narayana.

Venkata-subba Rao, J.

Judges refused to give effect to the rule of implied consent even when the guardian proposed happened to be a certificated guardian on whom there was a duty cast in law to safeguard the interests of the minor.

I shall now deal with the second question. When there is no guardian *ad litem* on the record who has consented to act, is the decree obtained null and void or is it voidable on proof of prejudice having accrued to the minor defendant? The preponderance of authority is, in my view, in favour of the position that the decree is a nullity. In *Pande Satdeo Narain* v. *Ramayan Tewari* (20), Das, J., in a very long judgment attempts to show that the balance of authority is the other way. But with great respect I am unable to agree with him. I shall first refer to *Khiarajmal* v. *Daim* (22). The facts are complicated and are very clearly stated by the Lords of the Judicial Committee and I shall not recapitulate them. The facts, however, so far as they are relevant to the question under consideration, are extremely simple. One Naurez died leaving a widow and four children including a son Amirbaksh. Suit No. 372 of 1879 was instituted *inter alia* against Amirbaksh described as a "minor aged about 14 years legal representative of Naurez deceased by his guardian his uncle Alahnawaz." Again, Suit No. 160 of 1878 was also filed against "Naurez, deceased, by his legal representative Amirbaksh by his guardian his uncle Alahnawaz." Two questions arose. First, whether the estate of Naurez was sufficiently represented when only one out of the five heirs was impleaded in the suit. Secondly, what was the effect of the decrees passed so far as the share of Amirbaksh was concerned?

The full import of the Privy Council judgment will become evident if, while reading it, these two points are kept distinctly in view. "Amirbaksh was of course one of the heirs of Naurez but in no other sense his legal representative. It is not pretended that Alahnawaz was in any legal sense or in fact his guardian or was ever appointed his guardian *ad litem*. It is, however, contended by the appellants that Naurez's heirs are bound by the proceedings in both the suits and that his share of the property, whatever it was, was effectually sold in the suit No. 160 of 1878 *or at any rate that the share of Amirbaksh himself passed by the sale*" (see page 35). Then their

20. (1923) I L R 2 Pat 335. 22. (1904) 32 I A 23.

Lordships overrule the contention that the Naurez's estate was sufficiently represented by one of his heirs Amirbaksh ; and in this connection they distinguish *Malkarjun* v. *Narhari* (23), and they equally clearly negative the second contention that Amirbaksh was duly represented on the record by his guardian Alahnawaz.

Now, let me reproduce another passage from the judgment. "In Suits Nos. 372 of 1879 and 160 of 1878, the Judge seems to have accepted without question the statement on the record that Amirbaksh was the legal representative of Naurez and Alahnawaz was his guardian and never applied his mind to the matter . Their Lordships think that the estate of Naurez was not represented in law or in fact in either of the suits and the sale of his property was therefore without jurisdiction and null and void. *Nor can they hold that the share of Amirbaksh himself in his estate was bound.*" It is obvious that their Lordships were dealing with two distinct and independent points and I find it impossible to agree with Mr. Justice Das that the Judicial Committee was not dealing with the second question. The learned Judge has been at great pains to analyse the facts, but with the greatest respect it appears to me that he has overlooked a very essential point in the judgment of the Privy Council.

It may be useful to refer to another passage in the judgment of the Judicial Committee. "Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in execution of them. But, on the other hand, the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or *properly represented on the record.* As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside" (P. 33).

I shall next deal with another case considered by Das, J., *Musammat Rashid-un-nisa* v. *Muhammad Ismail Khan* (24). In some proceedings the minor in that case was represented by her sister who acted as guardian *ad litem* and in certain other proceedings by an uncle by name Mauladad. Their Lordships held that so far as the sister was concerned, she was a married

23. (1900) L. R. 27 I. A. 216 10 M. L. J. 368.

24. (1909) L. R. 36 I. A. 168 19 M. L. J. 631.

F. B.
Vasireddi Sriramulu v. Putcha Lakshminarayana.
Venkatasubba Rao, J.

woman and therefore disqualified from being appointed guardian and in regard to Mauladad, they held that his interest was obviously adverse to that of the minor and he was therefore disqualified. They decided that the minor was not a party to the proceedings and the execution sales were null and void.

I shall now proceed to consider the third case referred to by Das, J., *Partab Singh* v. *Bhabuti Singh* (25). In the judgment of the Privy Council, reference is made to two suits but for the present purpose it is sufficient to notice the facts connected with one of them, that is, the suit brought by Bhabuti Singh on 26th June, 1899. The minors Partab and Abharan Singh were added as defendants to that suit. They were described as being under the guardianship of Hari Pershad. No order appointing Hari Pershad as a guardian for the minors was applied for or was made. The result was that the minors were not in law represented in the suit in question. Their Lordships observe, "As Hari Pershad had not been appointed guardian for the suit for the minors Partab Singh and Abharan Singh, they were in law unrepresented and the decree will not bind them." There was another ground to support the same conclusion but it is not at present material.

What do these three cases establish? In *Khiarajmal* v. *Daim* (22) the name of Alahnawaz appeared on the record and he was described as the guardian of Amirbaksh, the minor. Similarly, in *Partab Singh* v. *Bhabuti Singh* (25) Hari Pershad was described on the record as the guardian of the minors, Partab and Abharan. In neither case was the appointment of the guardian *ad litem* made by the Court. In *Musammat Rashid-un-nisa* v. *Muhammad Ismail Khan* (24) the sister and the uncle were appointed guardian *ad litem* but they were incompetent to act. In all the three cases, the Judicial Committee held that there was no representation of the minor at all and that the decrees or sales, as the case might be, were null and void. On the principle underlying these decisions, a decree obtained against a minor for whom a guardian was appointed without his consent would be equally ineffectual and be likewise a nullity.

I am glad to find that this is the law, for otherwise the interest of minors will be gravely imperilled. Hundreds of per-

22. (1904) 32 I. A. 23
24. (1909) L. R. 36 I. A. 168 : 19 M. L. J. 631,
25 (1913) L. R. 40 I. A. 182 : 25 M. L. J. 492.

F. B.

Vasireddi Sriramulu v. Putcha Lakshmi-narayana.

Venkata-subba Rao, J.

sons may be competent to act as guardians of a minor defendant, but if any of them is appointed without his consent merely because the plaintiff in the suit chooses to propose his name, does it follow that the man so appointed is either under a legal or moral duty to safeguard the minor's interest ? The proposed guardian not having consented, he cannot be made liable for any injury sustained by the minor, nor is he likely to be under any sense of personal responsibility in the matter. Mr. Justice Das distinguishes the three decisions to which I have referred and finds support for his conclusion in *Musammat Bibi Walian* v. *Banki Behari Pershad Singh* (26). I fail to see how this case is an authority for his position. The Subordinate Judge held that although no formal order appointing the mother to be the guardian *ad litem* of the infants has been drawn up the Court must be deemed to have sanctioned the appointment and that the want of a formal order was at most an irregularity (*see* page 188). The High Court disagreeing with the Subordinate Judge considered that there was nothing from which they could presume that the Court had sanctioned expressly or impliedly the appointment of the minors' mother as their guardian (*see* page 188). The Judicial Committee observes "Their Lordships are unable to concur in the conclusion at which the learned Judges arrived. The present plaintiffs were substantially sued in the former suit, and the alleged fraud has been negatived. It appears to their Lordships that they (the present plaintiffs) were effectively represented in that suit by their mother, and with the sanction of the Court." They then proceed to say that one of the defects which can be pointed out is that no formal order appointing the mother of the plaintiffs is shown to have been drawn up. In the result, they hold that the defects of procedure alleged were at most irregularities which could not invalidate the proceedings in the absence of proof of prejudice having accrued to the infants. There can be no doubt about the facts. *There was an appointment by the Court of a guardian* ad litem. *The order of the appointment was not, however, shown to have been formally drawn up.* This was considered in the nature of an irregularity and there is nothing in the judgment to warrant the view that if there was no representation the decree would not have been treated as void.

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26. (1903) L. R. 30 I. A. 182.

F. B.

Vasireddi Sriramulu v. Putcha Lakshminarayana.

Venkatasubba Rao, J.

Mr. Justice Das is at pains to establish that the mother did not in fact act for the minors at any stage of the suit and that some learned Judges in India were under a misapprehension on this point. It seems to me that this question whether the mother did or did not in fact act for the minors is of no importance, because the judgment of the Privy Council is based on two facts, viz., (1) that there was a proper appointment, and (2) that there was no formal order of appointment: and as the defect was held to be a mere irregularity the Judicial Committee proceeded to consider whether any prejudice resulted to the infants.

I am therefore of the opinion that a decree passed against a minor defendant where there is no consent on the part of the guardian *ad litem* to act as such is null and void, and it is unnecessary to set it aside in separate proceedings.

Coming to the facts of the case on hand, even if consent can in law be implied, I am of the opinion that the fact that over the signature of the proposed guardian *ad litem*, the endorsement appears containing the words " guardian-defendant " proves nothing, for it only means that the description in the endorsement was made to conform to the description in the notice, and it is not uncommon for persons to merely reproduce the words constituting the description when they are making an endorsement of this nature, without accepting the truth of the description. I agree to the questions, as stated by my learned brother, being referred for the decision of a Full Bench.

S. Varadachariar for *K. Ramamurti* for appellants.

T. Ramachandra Rao, A. Krishnaswami Aiyar and *Ch. Raghava Rao* for respondent.

The Court expressed the following

Coutts Trotter, C. J.

OPINION :—*The Chief Justice.*—In this case two questions have been referred to us by the Divisional Bench ; the first is, " whether, where a person has been appointed guardian *ad litem* for a minor but his consent to such appointment has not been obtained, the decree is a nullity, or whether it is merely voidable on good ground being shown therefor ?" The second question is, " whether the consent of a guardian to his appointment as such must be express or may be implied ?"

In the view we take of this matter, the answer we propose to the second question must end in a reference back to the Divisional Bench which may render the first of these questions

F. B.

Vasireddi Sriramulu v. Putcha Lakshmi narayana.

Coutts Trotter, C. J.

purely academic and one which need not arise for the determination of the suit. The words of the statute are contained in O. 32, R. 4, cl. (3) :—" No person shall without his consent be appointed guardian for the suit," and we are asked to say whether that consent can be implied or whether it must be express. There are cases that have been cited to us in which the learned Judges speak of express consent, but I do not think that before this reference arose the learned Judges who used the language which has been cited were really deliberately applying their minds to the question as to whether consent must under the statute be express. The statute does not contain the word " express," and I fail to see how Courts have a right to put into the statute a word which is not there. Consent is a question of fact. A person may have consented and there may be no direct evidence of it. The evidence may be inferential, indirect and circumstantial and, as my brother Wallace put it, it is purely a question of evidence. We are unaware of any rule of evidence which says that this simple question of fact--aye or nay, did this person consent to act—is to be decided by any different laws of evidence from those which guide Courts, in arriving at the determination of all questions of fact. Is the evidence before the Court sufficient to enable it to say with confidence, " we hold here on the evidence that there was consent by this man that he would act as guardian" ? We therefore think that the case must go back with the expression of our opinion that the answer to the second question referred to us is that the consent need not be express. It is quite true that the two learned Judges who formed the Divisional Bench gave an indication of what their finding would be on the question of fact ; but as they both approached it under the shadow of this supposed rule of law, it seems to us that it is better that they should reconsider the question under our direction and come to an express finding on the question as to whether there was a consent to be inferred from the evidence available to them or not. That is a matter for them and not for us.

Ramesam, J.—I agree.

Wallace, J.—I agree and have nothing to add.

C. A. S. *Reference answered.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT :—LORD SHAW, LORD BLANESBURGH AND MR. AMEER ALI.

Maharajadhiraj Sir Rameshwar Singh Bahadur ... *Appellant**

v.

Hitendra Singh and others ... *Respondents.*

P. C.

Sir Rameshwar Singh v. Hitendra Singh.

Receiver appointed by Court on application of judgment-debtors—Consent of decree-holder—Powers and duties of such Receiver—Res judicata—*Civil Procedure Code,* 1908, *S.* 11—*Civil Procedure Code,* 1877 (*Act X of* 1877), *S.* 13—*Consent order.*

A Receiver appointed by the Court, by consent of all parties, will not, in the absence of proof of maladministration, be removed or discharged. His powers of "realisation, management, protection, preservation and improvement of the property" include a discretionary power of sale, "to be exercised in good faith in the interests of the estate, with the approval of the Court."

A consent order does not prevent from impugning the administration thereunder "which is of such a character as either (*a*) amounts to malfeasance, and, accordingly, releases the consenter, or (*b*) has been proved by experience to be in substance so protracted and imperfect as to be futile."

Principles of doctrine of *res judicata* as explained in *Ram Kirpul Shukul* v. *Mussumat Rup Kuari* (1883 L. R. 11 I. A. 37), and *Hook* v. *Advocate-General of Bengal* (1921 L. R. 48 I. A. 187 : 40 M. L. J. 423) followed.

Appeal from an order of the High Court (31st March, 1920) which reversed an order of the Subordinate Judge of Darbhanga (4th August, 1919).

The facts and arguments sufficiently appear from the judgment of their Lordships, and from the report of the prior proceedings in *Maharajadhiraj Sir Rameshwar Singh Bahadur* v. *Hitendra Singh* (1).

L. de Gruyther, K. C. and *H. R. Abdul Majid* for appellant.

Sir George Lowndes, K. C. and *Dube* for respondents.

26th June, 1924. The Judgment of the Board was delivered by

Lord Shaw.

LORD SHAW :—These are two consolidated appeals from one judgment and two decrees of the High Court of Judicature at Patna, dated the 31st March, 1921. They partly affirmed

*P. C. Appeal No. 71 of 1923. 26th June, 1924.
(Patna Appeal No. 46 of 1921).

1. (1921) 6 Pat. L. J. 208.

P. C.

Sir Rameshwar Singh v. Hitendra Singh.

Lord Shaw.

and partly reversed a judgment and decree dated 4th August, 1919, of the Subordinate Judge at Darbhanga.

The appellant is the Raja of Darbhanga. The respondents are members of the junior branch of the Raja's family. As such they are in possession and enjoyment of certain babuana immoveable properties, which were the subject of a babuana grant made by the head of the family many years ago. Certain mortgages were granted to the appellant as well as to certain persons outside of the family, and there were mortgage and money decrees existing against the respondents to such an amount that it was thought expedient that a Receiver of the mortgaged properties should be appointed.

Upon the 2nd February, 1910, the judgment-debtors accordingly filed a petition for the appointment of a Receiver. On the 12th of the same month the appellant, the Raja, by his application consented to the appointment. Following upon these proceedings, the Subordinate Judge of Darbhanga, on the 9th April, 1910, made an order appointing a Receiver, and on the 14th of the month, a Receiver was appointed on six months' probation.

The terms of the appointment and its scope, together with the terms of the consent of the Raja appellant, will be presently referred to, but it is convenient to note certain subsequent dates of the proceedings. It appears from these sufficiently evident that, upon various important occasions in the history of these transactions, the Raja, having first consented to the appointment and administration by a Receiver, endeavoured to resile therefrom by various applications to the Court.

The appointment of the Receiver having been made in April, 1910, the Raja, so early as September following, applied for the discharge of the Receiver. In February, 1911, his application, having been considered, was dismissed. He appealed in April, made an affidavit in May, and upon the 7th June, 1911, the High Court made the consent decree, the purport and scope of which are now in issue.

The appellant, notwithstanding the consent decree of the 7th June, 1911, still continued to make applications to the Court substantially to destroy the administrationship of the Receiver, one of his objects being to compel sales of certain property after-mentioned. On the 25th July, 1914, he applied for the discharge of the Receiver to the Subordinate Judge.

P. C.

Sir Rameshwar Singh v. Hitendra Singh.

Lord Shaw.

The whole case was considered, and the Subordinate Judge dismissed the application on the 6th July, 1915. No appeal was lodged against this dismissal, and the judgment became final.

On the 26th January, 1917, the Raja made a further application to the Subordinate Judge in the same sense, to discharge the Receiver and generally for the same objects as before. In April the Subordinate Judge dismissed his application, and on the 20th June, 1918, the High Court dismissed his appeal.

The ink was hardly dry on this decision of the High Court till the Raja made his present application of the 23rd July, 1918, again for the same purpose and on the same grounds. On the 4th August, 1919, the Subordinate Judge made a decree partly allowing the Raja's claim, but upon the 31st March, 1921, the claim was dismissed by the High Court. It is this claim which has been strenuously argued at their Lordships' Bar.

Their Lordships are happy to record that, notwithstanding this protracted period of litigation at the instance of the Maharaja, for the purpose of destroying the receivership, the administration of the Receiver has proceeded steadily and to the satisfaction of the Court below, and with apparently great advantage to the interests of this family estate. The Board does not enter upon details, but, speaking generally, may observe that there is no suggestion made, or apparently possible, of any kind of mal-administration ; that a scheme approved by the Court under which the accounts of the estate have been regularly submitted to and approved by the Court, has been worked out most capably ; and this with, in the opinion of their Lordships, satisfactory and notable success.

In the course of the proceedings of the Court below, a view was expressed on the topic of *res judicata,* which, it was argued, was too absolute in its terms and would, it was urged, exclude the appellant too completely from all remedy open to him as a judgment-creditor. Consequently—and this appeared to their Lordships to be the substance of the complaint of the appellant—the previous pronouncements were, it was argued, really to the effect that the Receiver, in his administration, was precluded from all power of selling, even if good occasion or opportunity arose, any part of the estate under

P. C.

Sir Rameshwar Singh v. Hitendra Singh.

Lord Shaw.

mortgage, and was tied up to freeing the properties from mortgage debt out of annual income alone. If these reasons be the true reasons for the appeal, then the appeal may be at least intelligible. They will be presently dealt with. But they did not affect the substance of the difference between the parties, nor did they, in the judgment of the Board enter into the substance of the determination of the rights of parties contained in the decree of the High Court under appeal.

It is now important to determine the point and scope of the consent given by the Raja to the receivership. On the 12th February, 1910, it was in these terms :—

"That your petitioner has no objection to the appointment of a Receiver as prayed for by the applicants, and submits that a proper and representative man be nominated for the purpose."

The Receiver was appointed accordingly. It is noticeable that the petition for the appointment, after setting out that several decrees of the Maharaja Bahadur have been executed and some of the properties attached and advertised for sale, and objections lodged, goes on to state that "if some kind of arrangement be made the amount due under all the decrees which will be considered as legally due may be made up gradually;" and the prayer of the petition is "that a Receiver may be appointed by the Court for the entire estate of your petitioners and the legal debts may be paid gradually through the Receiver."

It was to this appointment "as prayed for by the applicants" that the appellant consented, and administration by a Receiver was accordingly begun.

It is now necessary, however, to record with precision the actual terms of the appointment, in so far as the Receiver's powers are concerned, as contained in the order of the Subordinate Judge of Darbhanga on the 14th April, 1910. These terms are as follows :—

"1. He shall have all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvements of the property, the collection of the rents and profits thereof, the application and disposal of such suits and property, and the execution of documents as the owners themselves have.

"2. He shall get 2 per cent. upon his collection as his remuneration, which shall not exceed Rs 300 per month.

"3. He shall furnish security to the extent of Rs. 10,000 and shall duly account for what he shall receive in respect of the property.

"4. He shall submit his accounts in Court every month.

P. C.

Sir Rameshwar Singh v. Hitendra Singh.

Lord Shaw.

"5. He shall pay Rs. 10 per cent. on the collection, but it will not exceed Rs. 1,200, for the maintenance of the Babu ; Rs. 250 to each of the four brothers ; Rs. 50 to each of the sons of Amarendra Babu, and Rs. 100 to the widow of Jibendra, per month.

"6. He shall be responsible for any loss occasioned to the property by his wilful default or gross negligence."

No objection has been suggested to the effect that the Receiver has acted in any respect improperly in regard to accounts, security of payments, etc. The administration has been correct.

The real question is as to the ambit of the Receiver's powers. On the 7th June, 1911, this order was varied in these terms, and a consent order was pronounced in these terms :—

"By consent of parties the order of the Court below is varied in the manner following, namely, the Government Revenue and Cesses and other outgoings, as per scheme framed by Court and the budget of the Receiver, are to be paid first, and then the decrees which do not carry any interest, and then the decrees which carry interest. This order is made subject to the payment of allowances to the judgment-debtor. There will be no order as to the costs of this Court. The Receiver will continue as before."

Having heard full argument, the Board is of opinion that this consent order of 7th June, 1911, did not abolish or abrogate the powers contained in the decree of 14th April, 1910. These two orders must be read together. In particular, under the terms "realisation, management, protection," etc., of the properties, a power of sale is not taken away from but is still vested in the Receiver.And if, for instance, such a power of sale had been exercised in good faith and in the interests of the estate, with the sanction of the Court, such a transaction could not have been challenged as *ultra vires*.

But the proposition of the appellant is a very different one. It is not that the power to sell may be exercised, but that, although even contrary to the Receiver's own ideas of prudence or advantage, it *must* be exercised ; and that, if it is not exercised at once or promptly, then the basis of the receivership has gone and it ought to be declared at an end. It is further suggested that it was only upon such a footing that the appellant consented to the receivership being set up.

This last contention may be disposed of at once. Fortunately, in the course of the proceedings, which culminated in the consent order in June, 1911, the Raja filed an affidavit. The Raja's understanding of the circumstances is made fairly clear by a petition for revision presented by him on 3rd April, 1911. His understanding of the position is thus narrated :—

"3. That on the 2nd February, 1910, the debtors applied to the Subordinate Judge that a Receiver might be appointed over their attached properties and that such Receiver, instead of selling the properties, might manage them and from the rents and profits after deduction of management expenses and after payment of some small allowances to the debtors for their maintenance, might pay up the decree debts according to the decrees."

It seems in these circumstances vain to deny that, in consenting to the Receivership, and being a party to the consent order as to administration, the scheme of the latter, a scheme which has throughout received the sanction and approval of the Court, was substantially this (1) The property under the babuana grant was, if possible, to be held together ; (2) allowances were to be made from the revenue year by year to the babuana holders ; (3) the outside creditors should, from the revenue, be paid off and their decrees extinguished ; and (4) lastly, with regard to the appellant's decrees, which amounted to very large sums and which were of two kinds, namely, decrees not bearing interest (amounting to between 8 and 9 lakhs of rupees), and decrees, bearing interest, the balance and revenue should be applied first to the extinction of the former, and that thereafter the interest-bearing decrees were to be extinguished. It is, in the opinion of the Board, quite clear that this scheme of administration would take a good many years to complete, that this was perfectly well known to the Maharaja, and that the throwing of large blocks of property on to the market was not the mode of administration which was desired, but that the gradual extinction of debt out of revenue was, if it proved feasible, to be preferred.

This scheme has worked well (1) Allowances of considerable amounts suitable to the station of the members of this important family have been made ; (2) the debts of all the mortgage holders other than the appellant—that is to say, of all the outside creditors, have been entirely wiped off ; (3) with regard to the debts due to the appellant, the Receiver has addressed himself with vigour to the extinction of these in priority to the interest-bearing debts. (4) It appears also to be an admitted fact that, when the suit was brought on the 26th January, 1917, the management of the Receiver from his appointment in 1910 till the end of 1916 had been so successful as to pay off over 4 lakhs of rupees ; while (5) from one of the statements lodged in the case, it is further apparent that in the next two years a sum of nearly 1 1|2 lakhs has been paid

P. C.

Sir Rameshwar Singh v. Hitendra Singh.

Lord Shaw.

off. This statement, without entering upon details, appears to represent the financial results with general accuracy.

The Board express no surprise at the reluctance of the High Court to interfere with an administration of this character; and, apart from the law of the case, which will be presently referred to, at their having arrived at a conclusion that to abolish the receivership and to permit the appellant to bring the properties to sale under execution, would probably accomplish the destruction of the babuana grants as such and the defeat of the object for which the consent order was obtained. The Board, further, sees no reason to throw doubt upon the opinion of the Receiver that acceleration in freeing properties from debts will progressively be made.

Enough has been said to indicate that, in the view of their Lordships, no case has been made out for either permitting the appellant as execution creditor to proceed with the sale of the babuana properties under his decrees, nor for imposing the duty of immediate realisation of these properties upon the Receiver.

It may seem, accordingly, unnecessary to deal with the protracted argument that was presented on the doctrine of *res judicata*. Their Lordships are in substantial agreement with the following passage in the opinion of Das J., when delivering the judgment of the High Court of 31st March, 1921:—

"The present application is an application by the decree-holder for an order that 'he may be allowed to proceed with the sale of the properties mortgaged in execution of his mortgage decree and with the execution of his decrees generally' and for the discharge of the Receiver. That was identically his application which resulted in the consent order on the 7th June 1911. That, again, was his application which resulted in the order passed on the 6th July, 1916. I do not for a moment doubt that the consent order or the order passed by the Court on the 6th July, 1916, will not stand in the way of the decree-holder, if the judgment-debtors depart from the terms of the consent order; but there is no suggestion that the terms of the consent order are not scrupulously adhered to. The only suggestion is that it will take many years, under the present scheme, to satisfy the decree held by the decree-holder. That argument, in my view, is not admissible, since the decree-holder must presumably have taken that argument into consideration when he first consented to the appointment of the Receiver, and then to the order passed on the 7th June, 1911."

It was strongly urged that a rigorous construction must be given to the provisions of the Civil Procedure Code and that the language of S. 11 of the Code of 1908 could not be applied to the present suit as it did not fall within the statutory words. "Any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and has been heard

P. C.

Sir Rameshwar Singh *v.* Hitendra Singh.

Lord Shaw.

and finally decided by such Court." It seems extremely doubtful whether there is any distinction whatsoever between the present and the former suits. But, in the construction of this section, as was the case also in the construction of S. 13 of the Code of Civil Procedure of 1877, it has been long recognised that the principle laid down by Sir Barnes Peacock in *Ram Kirpul Shukul* v. *Mussumat Rup Kuari* (1) is correct, when the learned Judge said :—

"The question, if the term '*res judicata*' was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon S. 13, Act X of 1877, but upon general principles of law. If it were not binding there would be no end to litigation."

And recently before this Board in *Hook* v. *Administrator-General of Bengal* (2) that rule was re-affirmed.

There can be no real doubt that, in the course of the judgment in this case, two radical issues were definitely settled. First, that extinction of debt was part of the scheme which was to be gradually operative, and, secondly, that the appellant, under the consent order, was bound to this gradual procedure. Their Lordships accordingly assent to the judgment of the High Court in the passage above cited. That pronouncement, in their Lordships' opinion, was not made nor must it be taken in a sense which absolutely precludes, should proper occasion arise, a sale of the mortgaged properties by the Receiver. If the pronouncement has such a meaning or effect, then, in the opinion of the Board, it is erroneous.

Upon the topic of consent orders their Lordships think that the principle to be applied is as follows :—

Where a consent order is obtained it always remains open to challenge administration thereunder which is of such a character as either amounts to malfeasance, and accordingly releases the consenter, or, secondly, has been proved by experience to be in substance so protracted and imperfect as to be futile.

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1. (1883) L R 11 I A 37. 2. (1921) L R 48 I A 187 : 40 M L J 423.

P. C.

Sir Rameshwar Singh *v.* Hitendra Singh.

Lord Shaw.

In the view of the Board both malfeasance and futility are negatived in the present case. It is unhappily true that, notwithstanding the sensible rule laid down by Sir Barnes Peacock as to interlocutory orders, there has not, in this case, been the end of litigation such as he might have forecast. Probably, however, that end may now be in view and the Receiver may be left to work out the salvation of the property.

Their Lordships, however, take the opportunity of again referring to the subject of realisation by sale in the present case of any of the properties under mortgage. Such a realisation is not, in the opinion of the Board, *ultra vires,* but *intra vires* of the Receiver. He may decline, as he has done in the past, to put the properties to sale, and it is for him to consider carefully the result of putting blocks of property on the market. But if, in his view, a sale would be, in certain conjunctures of circumstances, of advantage, then he might, with the necessary sanction, well exercise his power of sale accordingly.

Their Lordships will humbly advise His Majesty that the appeals should be disallowed with costs.

Solicitors for appellant : *Sanderson* and *Orr Dignams.*

Solicitors for respondents : *Watkins* and *Hunter.*

A. de M. *Appeal disallowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT:—LORD SHAW, LORD BLANESBURGH, AND MR. AMEER ALI.

Maharajadhiraj Sir Rameshwar Singh Bahadur ... *Appellant**

v.

Hitendra Singh and others ... *Respondents.*

P. C.

Sir Rameshwar Singh *v.* Hitendra Singh.

Mortgage—Decree under O. 34, R. 4 of Civil Procedure Code—Receiver of property under mortgage—Effect of appointment of—Action by Receiver against decree-holder for account and possession.

In 1899, the mortgagee in exercise of his rights under a mortgage executed in 1892, obtained the usual decree for sale of the mortgaged property (the village of Jainagar). In 1910, on the application of the judgment-debtors and with the consent of the mortgagee (decree-holder), the Court appointed a Receiver of the properties of the judgment-debtors. After various subsequent proceedings, the Receiver and the judgment-debtors instituted proceedings against the mortgagee for an account of his receipts from the mortgaged property, and for delivery up of possession of the said village. The Subordinate Judge of

*P C Appeal No. 5 of 1923 (Patna Appeal No. 20 of 1921). 26th June, 1924.

Fizabad decided that the Receiver was not entitled to possession, but only to debit the mortgagee in the accounts with the sum of Rs. 1,471-3-5 per annum (instead of Rs 1,600 as previously) for sums received from the property. The High Court on appeal reversed this judgment, and made a decree directing the Maharaja to deliver up possession of the said village to the Receiver.

Held, by the Privy Council (affirming the judgment of the High Court) that the Receiver was entitled to *khas* possession of the village, and should in future administer and manage it as part of the estate under his charge, subject to being credited in the accounts by the mortgagee with Rs. 1,471-3-5 for collections made up to the last decree of the High Court.

Appeal from a decree of the High Court (19th November, 1920) reversing a decree of the Subordinate Judge of Darbhanga (16th June, 1919).

On the 6th April, 1892, one Babu Durga Dat Singh, a cadet of the Darbhanga family, executed a mortgage-deed in favour of Raja Rameshwar Singh Bahadur of Darbhanga, which contained the following special clause relative to the village of Jainagar :—

"I do therefore execute this bond for Rs. 4,70,858-8-5 1-2, half of which is Rs 2,35,429-4-2 3|4 and make these trustworthy declarations and give out in writing, and that for the payment of Rs. 1,600 out of Rs. 47,085-13-7 1|2, due to the said creditor on account of the annual interest of the said amount of debt at 10 per cent. per annum I have let out in Sudbharna lease to the said Raja Saheb Bahadur 7 annas 8 Gundas 3 Cowris share out of 16 annas of Mauza Jainagar, Pargana Bachhour, a Nankar Mahal, bearing No. 399 in Register C of the Collectorate situate within the jurisdiction of Sub-Division and Sub-Registry Madhubani, District Darbhanga, together with sairs, hats, etc., and all Zamindari rights which share is owned and possessed by the joint family at an annual *Jama* of Rs 1,600 from 1300 to 1304 Fasli. The said creditor is at liberty to continue in my stead in possession thereof either directly or through Mustajir, till the repayment time of the principal and interest and appropriate the produce thereof. The sum of Rs. 1,600 the amount of annual rent shall be set off annually against the interest on Rs 16,000 a portion of the principal ; and the said Raja Saheb, his heirs and representatives of (?) his authorised servants will without any objection allow a set off of the same the remainder of the annual interest, *i. e.*, Rs. 45,485-13-7 1|2 shall be paid by me in one lump sum on the 15th April, in each year ; I shall pay the principal in full in one lump sum, on the 15th April, 1897, and the interest namely, Rs. 45,485-13-7 1|2, if not paid annually as stipulated above shall be treated as principal and I will pay the interest thereon at the said rate ; this will continue until the repayment of the principal and interest. In case of default in the payment of the interest and compound interest as promised above, the said Raja Saheb shall be at liberty to institute suit even within the due date and realize, with the exception of Rs 16,000, the lien on 7 annas 8 Gundas 3 Cowris share of the said Mauza Jainagar, together with Rs 1,600 the remaining amount of entire compound interest and future interest from the whole or a part of mortgaged and hypothecated property and from the person and other *Nami* and *Benami*

P. C.

Sir Rameshwar Singh v. Hitendra Singh.

joint properties of the joint family of me the declarant or my present and future heirs and representatives."

On the 14th December, 1899, the Maharaja instituted a suit (No. 114 of 1899) on the said mortgage in the Court of the Subordinate Judge of Darbhanga against the mortgagor, his sons and grandsons, alleging *inter alia* in his plaint :—

"9. That the plaintiff gave to the defendant, first party a notice, dated the 30th May, 1899, intimating to him, that he had given up possession of 7 annas 8 Gundas 3 Cowris share of Mauza Jainagar from the 3rd May, 1899, and asking the defendant, 1st party to take possession of the aforesaid properties, but the defendant first party, in his reply, dated the 27th May, 1899, declined to take possession of the same and asked the plaintiff to retain possession of the said share. Therefore the plaintiff still holds possession of it."

"14. That Bighas 115-0.15 Dhurs of land of the said Mauza Jainagar, held by the plaintiff, under the settlement mentioned in paragraph 6 of this plaint, was acquired by the Government for the extension of the Sakuri Jainagar line, and the aforesaid land passed out of the possession of the plaintiff in March or April, 1897 ; and consequently the plaintiff has suffered a loss of the interest on Rs 16,000 as per account given below. Therefore he is entitled to have the loss of the said amount if interest made good by the defendants."

All the defendants filed written statements ; and on the 29th March, 1901, the Subordinate Judge (H. G. Mukerji, Esq.) delivered his judgment deciding that the lease of Jainagar did not bar the suit, and that, in consequence of the acquisition by Government of a part of the village, the rent payable was Rs. 1,471-3-5 a year, instead of Rs. 1,600; and he made a decree for sale. Against the said decree, there was an appeal to the High Court, and a further appeal to His Majesty in Council. See *Durgadut Singh* v. *Maharaja Sir Rameshwar Singh Bahadur* (1).

Applications were made to execute the said decree, and on the 14th April, 1910, the Subordinate Judge under Order 40, R. 1 of the Civil Procedure Code, 1908, appointed a Receiver of the judgment-debtor's estate. On the 21st August, 1911, the judgment-debtors, through the Receiver, made an application (Mis. Appn. 62 of 1911) to the Subordinate Judge for an order to credit towards satisfaction of the said decree the actual realisations by the Maharaja from the village of Jainagar, and not the stipulated amount of rent. On the 11th November, 1911, objections were lodged ; and on the 11th June 1912, the Subordinate Judge decided that credit should only be given for Rs. 1,600 a year. On the 1st July, 1914, another application (Mis. Appn. 67 of 1914) was made to credit the whole income

1. (1909) I L R 36 C 943.

P. C.

Sir Rameshwar Singh v. Hitendra Singh.

from the said village. On the 7th November, 1914, objections were made, and on the 15th March, 1915, the Subordinate Judge decided that the matter was *res judicata* by virtue of the order of the 11th June, 1912.

On the 22nd July, 1918, the judgment-debtors and the Receiver filed a petition praying for an account and the delivery of possession of the said village to the Receiver. On the 4th January, 1919, objections were lodged, contending *inter alia* that there was no legal claim on the merits, and that the orders in the proceedings of 1911 and 1914 were a bar to the present application. On the 16th June, 1919, the Subordinate Judge (A. N. Nand Singh, Esq.) delivered judgment, dismissing the application. He held that the Receiver was not entitled to possession, and that he was only entitled to debit the Maharaja in the accounts with the sum of Rs. 1,471-3-5 per annum. On appeal the High Court of Judicature at Patna (Das and Adami, JJ.) on the 19th November, 1920, reversed the judgment of the Subordinate Judge and made a decree directing the Maharaja to deliver possession of the said village to the Receiver.

The Maharaja appealed to His Majesty in Council.

L. de Gruyther, K. C. and *H. R. Abdul Majid* for appellant.

Sir George Lowndes, K. C. and *Dube* for respondents.

26th June, 1924. The Judgment of the Board was delivered by

Lord Shaw.

LORD SHAW :—This is an appeal from a judgment and decree of the High Court of Judicature at Patna, dated the 19th November, 1920. It reversed a judgment and order of the Subordinate Judge of Darbhanga dated 16th June, 1919. Their Lordships refer to the judgment of the Board just announced in the case between the same parties, namely the Maharaja as judgment-creditor, and the Receiver of the property and the judgment-debtors.

A Receiver was appointed in 1910 as a Receiver upon the entire estate of the judgment-debtors. It is not disputed that this estate included, and still includes, the mortgaged property of Jainagar which is in question in this case. Jainagar was expressly and by name included in the scheduled properties falling within the order for receivership. Under transactions, upon which it is not necessary to enter, the appellant possessed the property, under an arrangement that he should be debited with the sum of 1,600 rupees per annum in respect thereof,

P. C.

Sir Rameshwar Singh *v.* Hitendra Singh.

Lord Shaw.

The arrangement appears for a period of years to have been not to the disadvantage of the estate. Of late years, however, the rental of the property has exceeded the 1,600 rupees and, in or about the year 1918-1919, amounted to over 2,700 rupees per annum.

In these circumstances the Receiver brought his suit before the Subordinate Judge of Darbhanga, claiming :—

"1. That the decree-holder may be directed to render an account of all his collections of the said mauza from the date of the decree to the present date.

"2. That the decree-holder may be directed to give up and make over possession of the said Mauza to the Receiver with such amount as the decree-holder may be liable to pay to the judgment-debtors with interest at 12 per cent. per annum."

The question of accounts will be afterwards dealt with The immediate question is whether the appellant "do make over to the Receiver *khas* possession of the judgment-debtor's share of Mauza Jainagar." The case has been carefully considered by the High Court and their Lordships see no reason to differ from these paragraphs of the judgment of Das, J.—

"The decree which he (*i. e.,* appellant decree-holder) got was the usual mortgage decree contemplated by O. 34, R. 4, and whatever rights he may have had under the transaction he must be deemed to have given up these rights, once he asked for and obtained a decree for sale in respect of the property in question. That being so, have the judgment-debtors a present right to remove the decree-holder from the possession of the property in question ? In my view they have, because there is a prior order passed by a Court of competent jurisdiction appointing a Receiver and asking the Receiver to take charge of all the properties comprised in the mortgage. That order was final between the parties, and it was not open to the learned Subordinate Judge to ignore or disregard that order.

"No doubt there was an arrangement by which the decree-holder remained in possession of the properties and applied the income towards part satisfaction of the debt due to him. Subsequently a Receiver was appointed, who is a person to guard the interest of all the parties concerned, and that Receiver was specifically directed to take charge of all the properties. In my view there cannot be any doubt whatever that the Receiver ought to be directed to take charge of the property in question, especially as it is suggested by Mr. K. B. Dutt, on behalf of the judgment-debtors, that property has an income of Rs 2,711-15-0."

The result will be that the Receiver will in future administer and manage this mauza as part of the estate under his charge. And it may be that, looking *inter alia* to the prolonged difficulty with the appellant the respondent may in the circumstances exercise his power of sale of this mauza—such a

power resting with him in accordance with the judgment just pronounced in the other appeal.

With regard to the accounting, in respect of the returns from the mauza, the learned Counsel for the Receiver stated to the Board on behalf of the Receiver that he was willing that the years prior to the institution of the suit during which the appellant was in possession under an arrangement for an annual debit of 1,600 rupees— those years should not be gone back upon. It was further explained that a statement made by the appellant in his petition of objection of 14th December, 1918, was correct :—" 4. Although previously orders for the deduction of 1,600 rupees from the decretal money were passed by this Court in Suit No. 62 of 1911, and No. 67 of 1914, it was due to an oversight as the decision of the Subordinate Judge of Muzaffarpur was lost sight of. The petitioners cannot take advantage of that mistake and this petitioner, the opposite party (that is to say the present appellant), has no objection to the deduction of Rs. 1,471-3-5. It is, therefore, prayed that the petition filed by the petitioners for an annual deduction of 1,600 rupees be disallowed and that Rs. 1,471-3-5 only be ordered to be set off annually (against the decretal money)." In their Lordships' view it is proper that this correction should be given effect to.

In the matter of accounting it may be sufficient to satisfy the justice of the case that accounts be ordered upon the footing, first that the Receiver do obtain *khas* possession of this mauza from the appellant, and in the accounts he be credited by the appellant with Rs. 1,471-3-5 per annum as due for the appellant's possession up to 19th November, 1920, being the date of the decree of the High Court. Thereafter the accounts will embrace the entire receipts.

With this variation their Lordships will humbly advise His Majesty that that decree be affirmed with costs.

Solicitors for appellant : *Sanderson* and *Orr Dignams*.

Solicitors for respondents : *Watkins* and *Hunter*.

A. de M. *Decree affirmed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT:—LORD DUNEDIN, LORD SHAW, LORD CARSON, LORD BLANESBURGH, AND SIR JOHN EDGE.

Lachhmi Narayan Agarwala and others *Appellants**

v.

Rameshwar Prasad Singh and others *Respondents.*

P. C.

Lachhmi Narayan Agarwala v. Rameshwar Prasad Singh.

Stamp Act (II of 1899), Ss. 26 and 35—Mining lease—Claim for royalty exceeding amount covered by stamp on lease—Payment of deficient duty and penalty.

By the combined operation of Ss. 26 and 35 of the Stamp Act (II of 1899), a lessee under a mining lease is entitled, upon payment of the proper penalty, to recover the royalty provided for in the lease, even though the amount thereof should prove to be in excess of that covered by the stamp originally affixed to the lease.

Judgment of High Court affirmed.

Appeal from a judgment and decree of the High Court, dated 9th August, 1920 [reported in *Lachmi Narain Marwari* v. *Balmakund Marwari* (1)] affirming the judgment and decree (27th September, 1917) of the Subordinate Judge of Purulia.

On the 14th December, 1906, Kumar Braja Mohan Singh granted in favour of Ghanohyam Das Agarwala a *patta* or lease for 999 years of 32 *Bighas* of coal-mining land situate at Mauza Jharia, in consideration of a *salami* of Rs. 1,920 and subject *inter alia* to the following terms and conditions, *viz.*, (*a*) the lessee to pay a commission of 5 annas per ton on coal including coal-dust obtained from the mine and despatched by rail or sold or otherwise disposed of at the mouth of the pit; such commission to be payable by four quarterly instalments during each year, and arrears thereof to bear interest at 1 per cent. per annum; (*b*) a minimum royalty of Rs. 960 per annum to be paid by the lessee if the aforesaid commission at 5 as. per ton should fall short of that amount. The document was stamped with a revenue-stamp of Rs. 40 (*i. e.*, Rs. 20 in respect of the *Salami*, and Rs. 20 on the estimated amount Rs. 2,000 of the average yearly commission).

On the 6th March, 1917, Kumar Braja Mohan Singh instituted in the Court of the Subordinate Judge, Purulia, an action claiming an account of royalty and commission due under the

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*P C Appeal No. 47 of 1923. (Patna Appeal No. 47 of 1923) 26th June, 1924.

1. (1920) 5 Pat. L. J. 383.

P. C.

Lachhmi Narayan Agarwala v. Rameshwar Prasad Singh.

aforesaid *patta* for the years 1911—1916, and payment thereof with interest at 12 per cent per annum on the total quantity of coal produced. He valued his claim at Rs. 39,900 for the purpose of court-fees. The original grantees were defendants 1 to 4 in the action, and defendant 5 was joined as a party, having on the 3rd July, 1911 purchased the right, title and interest of defendants 1 to 4 in the said mining land.

The main defence for the purposes of this report was that, under S. 26 of the Stamp Act (II of 1899), the plaintiff would not be entitled to recover an amount higher than that (viz., Rs. 2,000) covered by the stamp on the aforesaid lease of the 14th December, 1906.

On the 27th September 1917, the Subordinate Judge (J. C. Bose, Esq.) gave judgment for the plaintiff for Rs. 20,622-5-9 with interest at 6 per cent. subject to his paying under S. 35 of the Act an additional duty and penalty (Rs. 180 and Rs. 1,800—Rs. 1,980). The High Court (Dawson Miller, C. J. and Mullick, J.) on appeal on the 9th August, 1920 affirmed this judgment.

The defendants appealed to His Majesty in Council.

Sir George Lowndes, K. C. and *E. B. Raikes* for appellants :—The case falls under S. 26 of the Act, and not within either of its provisos, and these provisions exhaust the exceptions to the section. The lease in question was duly stamped under the Act, and S. 35 had no application to it. If and so far as S. 35 would have otherwise applied, the succeeding section (S. 36) precluded such application. The judgments under appeal are against the letter and policy of the Act. Also, the amount of the stamp was part of the contract between the parties, and the respondents had no right to vary it. If the view of the High Court is correct, the lease was neither admissible in evidence nor valid in law.

The respondents were not represented.

26th June, 1924. The Judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN.—In this case, which has been heard *ex parte*, Sir George Lowndes has said everything that could be said on behalf of the appellants, but he has not created any doubt in their Lordships' minds that the judgment of the High Court at Patna was right. It is clear to their Lordships that the proviso (*a*) of S. 35 of the Indian Stamp Act, 1899, is of equal ambit with the body of the section, and that just as an instrument cannot be acted upon, that is to say, nothing can be

P. C.

Lachhmi Narayan Agarwala v. Rameshwar Prasad Singh.

Lord Dunedin.

recovered under it unless it has a proper stamp, so the proviso provides that if there is not a proper stamp it may be put on afterwards on payment of a penalty and the instrument then becomes effective.

Their Lordships will humbly advise His Majesty that the appeal be dismissed.

Solicitors for appellants *W W. Box and Co.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice.*

Souriraja Naidu and another *Appellants* (Defts. 1 and 2)*

v.

Rajagopalan and others *Respondents (Plaintiffs and L. R. of 3rd Plaintiff).*

Souriraja Naidu v. Rajagopalan.

Indian Easements Act, S. 13 (b)—Sale of portion of land—Irrigation facilities —Easement of necessity.

Where a portion of land is sold, an easement apparent, continuous and necessary for enjoying the portions severed from the transferor's land will pass to the transferee unless a contrary intention is expressed in the instrument of transfer. Where the lands sold are wet lands, and prior to the transfer they were irrigated by means of a channel passing over the lands still remaining with the transferor, unless there is a stipulation to the contrary at the time of the transfer, the transferee is entitled to the same facilities for irrigation that used to be attached before. Where such a right is claimed it is no answer to say that some other irrigation supply might be obtained. *Morla Gangulu* v. *Thata Jagannatham,* (1923) 45 M. L. J. 724 followed.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram in A. S. Nos. 2 and 3 of 1922 preferred against the decree of the Court of the Additional District Munsif of Tiruvalur in O. S. No. 126 of 1920.

T. Narasimha Aiyangar and *R. Gopalaswami Aiyangar* for appellants.

K. Rajah Aiyar for respondents.

The Court delivered the following

JUDGMENT:—The plaintiffs 1 and 2 and the 3rd plaintiff owning adjacent plots of land instituted this suit to establish a common right of easement to take water over the defendant's land by a channel marked A, X, Y and B. They base their claims on allegations of easement by prescription and easement of necessity. The District Munsif finding that the

*S. A. No. 27 of 1923. 9th January, 1924.

plaintiffs 1 and 2 had not proved any right of easement by prescription and could not claim an easement of necessity dismissed their suit. But he granted a decree to the 3rd plaintiff on the finding that he had enjoyed the right of irrigation by means of a channel X, Y for more than the statutory period. The plaintiffs 1 and 2 appealed against the dismissal of their suit. The defendants appealed against the decree given to the 3rd plaintiff.

The Subordinate Judge who heard the appeals found that the plaintiffs 1 and 2 had got an easement apparent and continuous and necessary for enjoying their lands which were obtained by means of a sale deed from the defendants in 1900. In the first Court there was no consideration of the question whether the right of plaintiffs 1 and 2 could fall within S. 13 (*b*) of the Easements Act. The suit of these plaintiffs was dismissed because the District Munsif found that the easement claimed was not absolutely necessary for enjoying the lands seeing that it was possible to irrigate them through another channel which would not pass over the defendants' lands. The Second Appeal is brought against the decrees in favour of both sets of plaintiffs. In respect of the 3rd plaintiff's case both Courts have found that he has no means of irrigating his land except through the channel X, Y and that it was so irrigated before it was severed from defendants' lands and therefore nothing more can be said in second appeal against the correctness of the decree which is based on a finding of fact by two Subordinate Courts. But as against the plaintiffs 1 and 2 it is now suggested that if the easement is to be treated as one apparent and continuous and necessary, there should be a finding that it was apparent between the points Y and B. The Commissioner who went to the spot found that there once existed a *kanni* between X and Y. But he was not able to say positively whether any water-course existed between Y and B. The Subordinate Judge has found that the channel A, X, Y, B, was in existence for a long time and irrigating the lands 9 A. C. and 8A, that is, the lands of both sets of plaintiffs. The Subordinate Judge was mistaken in saying that the District Munsif had found the existence of a channel between Y and B and that the Commissioner's report supported its existence. It has been suggested therefore that a finding should be called for on the evidence as to whether there was an apparent easement between Y and B. I do not consider it necessary to do so. Not only is the conclusion of the lower appellate Court clear

Souriraja Naidu v. Rajagopalan.

that such a channel existed, but it seems to have been the common case of both parties in the first Court that there was a channel all the way between X and B. Not only did the plaintiffs assert the existence of this channel in their plaint but the defendants did not deny its existence. Their answer to the plaintiff's claim was to allege that they themselves had dug a small *kanni* for their own irrigation purposes between X and B. The 3rd plaintiff who was examined as P. W. 1, the plaintiff's 2nd witness, the Village Munsif and his 4th witness, a mirasidar of that village, speak to the *kanni* taking a bend towards the east ; and the karnam examined as D. W. 2 says that the portion east of Y was seen by him and had been filled up. As there is evidence to support the Subordinate Judge's finding as to the existence of the channel not only over X, Y, but also Y, B, the Second Appeal can be disposed of without referring the matter to the lower Court again. It was suggested at the trial in the lower Court that the land of plaintiffs 1 and 2 might be irrigated from the channel at the north of their land by taking water through the cuttings at M (1) and M and therefore it was argued that the easement was in any case not necessary for enjoying the subject of the transfer. In a recent decision of a Bench of this Court, *Morla Gangulu* v *Thata Jagannatham* (1) Devadoss and Coleridge, JJ. referring to *Watts* v. *Kelson* (2) observed that it was no answer to the plaintiff's claim that a water-course was necessary for the use of a tenement conveyed to them to say that if that supply was cut off, possibly some other supply might be obtained. An easement apparent and continuous and necessary for enjoying the portions severed from the transferor's land will pass to the transferee unless a contrary intention is expressed in the instrument of transfer. It appears, as has been found by the Courts below, that before the plaintiff's plots were severed from the defendant's plots these wet lands were irrigated by means of the channel passing over the plot which still remains in the defendants' possession. Unless there was a stipulation to the contrary at the time of the transfer, the transferees were entitled to the same facilities of irrigation that used to be attached to the land transferred before it was transferred and the defendants are not entitled now, 20 years later, to tell the transferees to look out for some new source of supply on the ground

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1. (1923) 45 M. L. J. 724. 2. (1871) 6 Ch. A. 166.

that they do not wish to let them enjoy those irrigation facilities which were attached to the land before it was sold. From this point of view the judgment of the Subordinate Judge is correct and the second appeal is dismissed with costs.

Souriraja Naidu *v.* Rajagopalan.

T. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Rajagopala Iyer *Petitioner* (Plaintiff)*

v.

Thathayya Arunachala Iyer and others *Respondents (Defts. Nos. 2 to 8)*

Contribution—Suit for—Joint tort feasors—Who are—Failure to prove common defence set up—Effect of.

Rajagopala Iyer *v.* Arunachala Iyer.

Where a number of defendants in a suit fail to convince the Court that the defence set up is true, they cannot be treated as joint tort feasors and a suit for contribution as between them is maintainable.

Quaere if there can be no decree for contribution among joint tort feasors ?

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore in S. C. S. No. 1494 of 1919.

T. L. Venkatrama Iyer, V Narayanaswami Iyer and *R. Sethurama Sastri* for petitioner.

K. Rajah Iyer for respondents.

The Court delivered the following

JUDGMENT :—In Small Cause Suit No. 1494 of 1919 on the file of the Court of the Subordinate Judge of Tanjore plaintiff sued for contribution. In O. S. No. 409 of 1906 on the file of the Court of the District Munsif of Tiruvadi he was sued as defendant No. 6 along with defendants, deceased father of the present defendant Nos. 3 to 8 and defendants Nos. 1 and 2 who are also defendants Nos. 1 and 2 in this suit. The costs were recovered from plaintiff and he sues for contribution. The lower Court has dismissed the suit on the ground that defendants Nos. 2, 5 and 6 in O. S. No. 409 of 1906 were joint tort feasors, and plaintiff files this petition for revision (1st defendant pleaded payment and the point was found against him).

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*C. R. P. No. 155 of 1921. 10th March, 1924.

Rajagopala Iyer
v.
Arunachala Iyer.

There is authority for holding that there can be no decree for contribution among joint tort feasors. Vide *Manja* v. *Kadugochen* (1), *Gobind Chunder Nundy* v. *Srigobind Chowdhry* (2) though that authority is shaken by the observations of Lord Herschell in *Parlmer* v. *W. P. Steam Shipping Co.* (3) quoted in *Siva Panda* v. *Jujusti Panda* (4). However, assuming that the authority holds good, there remains the question of fact whether these defendants in O. S. No. 409 of 1906 are proved to have been joint tort feasors.

The second defendant actually pleads in his written statement that he made a fraudulent defence, but that plea has no evidentiary value, and can be ruled out on the principle *nemo allegens turpitudinem suam est audiendus.*

Respondents Nos. 3 to 8 are children of defendant No. 5 in O. S. No. 409 of 1906. In his judgment in that suit the Munsif held that defendants Nos. 5 and 6 were estopped under S. 317 of the old Code of Civil Procedure from pleading that the purchase of certain items was *benami.* He also found that the story was untrue and did not believe that the father of 6th defendant paid a moiety of the purchase money. The appellate Court found that plaintiff's evidence was defective, and that of defendants Nos. 5 and 6 was not sufficient to justify an affirmative conclusion. The Munsif also found that second defendant acted under the influence of defendants Nos. 5 and 6. On these findings it would be impossible to base a definite charge of perjury against defendants Nos. 5 and 6. The most that can be said is that they failed to convince the Court that their contention was true, and no one suggests that whenever joint defendants fail in a suit they should be treated as tort feasors.

Accordingly I find that plaintiff is entitled in law to claim contribution as sued for. The petition is allowed with costs to petitioner throughout.

T. S. V. *Petition allowed.*

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1. (1883) I. L. R. 7 M. 89.
2. (1897) I. L. R. 24 Cal. 330
3. L. R. 1894 A. C. 318.
4. (1901) I. L. R. 25 M. 599 at 603

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

A. Venkataramana Bhatta and another *Appellants** (*Defendants Nos.* 11 *and* 12)

v.

Krishna Bhatta and others *Respondents* (*Plaintiffs Nos.* 2 *to* 4 *and* 6 *to* 8).

Venkataramana Bhatta v. Krishna Bhatta.

Landlord and tenant—Covenant against alienation—Forfeiture clause—Alienation of portion of lease property—Effect of—Principles of construction.

A lease deed contained a clause for forfeiture if the rights under the term lease were alienated. Some of the items comprised in the lease were alienated and the landlord claimed to enforce his right of forfeiture. *Held,* it could not be enforced as the clause did not refer to partial alienations but only to alienation as a whole.

A clause for forfeiture must always be construed strictly as against the person who is trying to take advantage of it, and effect should be given to it only so far as it is rendered absolutely necessary to do so by the wording of the clause. A covenant against assignment does not prevent the tenant from assigning for any part of the term or from assigning any portion of the premises and unless the covenant is expressly worded to exclude a partial alienation of the premises, a partial alienation will not work forfeiture. *Grove* v. *Portal,* (1902) 1 Ch. D. 727 followed ; *Vittappa Kuda* v. *Durgamma,* (1919) 38 M. L. J. 190 referred to.

Second Appeal against the decree of the District Court of South Kanara in A. S. No. 347 of 1920 preferred against the decree of the Court of the Additional District Munsif of Kasargod in O. S. No. 50 of 1920 (O. S. No. 186 of 1919 on the file of the Court of the Principal District Munsif of Kasargod).

B. Sitarama Rao for appellants.

T. Ananda Rao for respondents.

The Court delivered the following

JUDGMENT :—The appellants before me are defendants 11 and 12. The property in question belongs to defendants 1 to 10. It was mortgaged by them in 1910 to the plaintiffs who are the representatives of what is called the Bhandaram under an usufructuary mortgage. Defendants 1 to 10 obtained the property back from them under a lease for 63 years. In that lease deed there is a covenant for forfeiture on alienation the effect of which is the point to be considered in Second Appeal. Defendants 1 to 10 subsequently mortgaged again to defendants 11 and 12 some portions of this property as well

*Second Appeal No. 1249 of 1921. 17th March, 1924.

Venkataramana Bhatta v. Krishna Bhatta.

as some other properties belonging to them under a usufructuary mortgage for a period of 90 years.

It is contended by the plaintiffs that on account of that transaction the covenant for forfeiture in the lease taken by defendants 1 to 10 from them has taken effect and that the plaintiffs are, therefore, entitled to recover possession of the properties from defendants 1 to 10 as well as from defendants 11 and 12 at once. The covenant is worded thus as translated by the lower Court :—" We shall not only deliver possession of the property to the Bhandaram alone by means of a surrender deed in case we do not enjoy the property and pay rent in conformity with the provisions of this term-lease till the expiry of the term but we shall not alienate in any manner our rights under this term-lease. If we should, contrary to this, effect any alienation then neither we nor our representatives in interest shall object to the Bhandaram cancelling the term and taking possession of the property and enjoying the same." If the clause for forfeiture applies in the circumstances of the present case, there can be no doubt that the plaintiffs are entitled to cancel the term of the lease granted to defendants 1 to 10 and to recover possession of the property and to hold it themselves as usufructuary mortgagees under defendants 1 to 10. But it is contended before me that there has been no forfeiture under this clause as the alienation by the second usufructuary mortgage was only of a portion of the property included in the lease, and such a partial alienation does not work a forfeiture under the clause in the lease deed. Both the lower Courts have rejected this contention. But it seems to me that there is force in it. A clause for forfeiture must always be construed strictly as against the person who is trying to take advantage of it, and effect should be given to it only so far as it is rendered absolutely necessary to do so by the wording of the clause. In this case the clause speaks of alienation of the defendants' rights under the lease deed in any manner. It does not refer to partial alienations at all but only to alienation as a whole. As was laid down by Mr. Justice Joyce in *Grove* v. *Portal* (1), a covenant against assignment does not prevent the tenant from assigning for any part of the term or from assigning a portion of the premises, and unless the covenant is expressly worded to exclude a partial alienation of the premises, a partial alienation will not work

1. (1902) 1 Ch. D. 727.

forfeiture under a clause which prevents alienation of the premises. It is always open to the landlord to put into his lease a covenant against alienation either complete or partial, if he intends that forfeiture should result from a partial alienation as well but where he does not do so the construction adopted in England is that the covenant will not apply to a partial alienation. As this view is based upon general principles of equity, I do not see why that same view should not be adopted and followed in India. Following the view adopted in *Grove* v. *Portal* (1) I consider that the alienation here, even though it affected a major portion of the property leased cannot be held to have worked a forfeiture of the period of the lease as the covenant in the document before me does not refer to partial alienation of property. The case of *Grove* v. *Portal* (1) was cited in *Vittappa Kuda* v. *Durgamma* (2) but it was distinguished there, as the property which was surrendered by the lady was the whole of the property she had then with her. But for the distinction I take it that the learned Judges would have followed the ruling. The question here is not one of giving possession to a third party as the lower Court seem to think. The covenant in the document does not speak of possession at all but of alienation of the rights under the lease. Holding that the usufructuary mortgage to defendants 11 and 12 was not sufficient to work a forfeiture of the term of the lease to defendants 1 to 10, the suit for possession must be dismissed. The decree of the Court of first instance so far as it relates to arrears of rent will not be interfered with.

As regards the costs, defendants 11 and 12 will be paid their costs as regards possession only by the plaintiffs in all the three Courts. The plaintiffs will bear their own costs on that portion of the case.

T. S. V.

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1. (1902) 1 Ch. D. 727.
2. (1919) 38 M. L. J. 190.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE RAMESAM.

Periyanayaki Ammal *Appellant**

v.

A. S. Rathnavelu Mudaliar (dead) and others *Respondents.*

Periya-nayaki Ammal *v.* Rathnavelu Mudaliar.

Hindu Law—Will—Construction—Vesting—Life estate to daughter with remainder to her son—Vesting of estate in son—His surviving his mother if a condition precedent.

By his will a Hindu gave certain properties to his daughters, the material clause of the will being: "These (meaning the daughters) have no power to make sale, gift, mortgage, etc., of these two houses and grounds. After these, their issues shall use and enjoy them from son to grandson and so on in succession so long as the sun and moon may last, with power of gift, mortgage, exchange and sale and they shall every year without default perform the aforesaid ceremonies, etc."

Held, on the construction of the will, that a son of one of the daughters who had predeceased his mother took nothing under the will.

Under the will, it was a condition precedent to any estate vesting in the daughter's son that he should survive his mother.

On Appeal against the judgment and decree, dated the 22nd November, 1922 of Mr. Justice Kumaraswami Sastriar passed in the exercise of the Ordinary Original Civil Jurisdiction in C. S. No. 544 of 1921.

V Radakrishnayya and *C. L. Nilakanta Mudaliar* for appellant.

M. Chockanatha Chetty for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENT :—*Ramesam, J.* :—In this appeal the first question that arises is the construction of a will. The testator Shanmugha Mudaliar died in December, 1912, leaving a will dated the 11th of November, 1911. Under this will he gave certain properties to his three daughters. We are now concerned with the disposition in favour of one of the daughters, Lokanayaki Ammal. She died on the 2nd of October, 1918. She had a son who was born on the 30th of September, 1918 and who pre-deceased her on the 1st of October, 1918 having lived only for a day.

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*O. S. A. No. 12 of 1923. 25th March, 1924.

The important clause in the will runs thus :—

"These (meaning the daughters) have no power to make sale, gift, mortgage, etc., of these two houses and grounds. After these, their issues shall use and enjoy them from son to grandson and so on in succession so long as the sun and the moon may last, with power of gift, mortgage, exchange and sale and they shall every year without default perform the aforesaid ceremonies, etc."

The first question that arises is whether under this clause a son of a daughter gets a vested estate immediately on his birth, or after the death of the mother, *i. e.*, after the termination of the preceding life-estate. In construing a will made in somewhat similar circumstances it is true that I held in that case (Appeal No. 141 of 1921) that the daughter's son took a vested estate immediately after his birth, following the decision of the Privy Council in *Bhagabati Barmanya* v. *Kalicharan Singh* (1); but I find that the language of the will in this case is somewhat different from that of the will in that case. For example, the clause referring to the daughter's son in the other case ran thus "If a male is born to my daughter, it will inherit the real property given to my wife and daughter." In this case it runs thus "After these, their issues shall use and enjoy them." There are other differences. The will before us is more consistent with the view that the testator intended that the daughter's son should get an estate only if he survived the daughter; in other words, that the son should survive the mother is a condition precedent to any estate vesting in him. If that is so, the son having predeceased the mother, no estate vested in him and nothing descended to his father. On this construction of the will, the further question argued by Mr. Radhakrishnayya as to the retrospective operation of Act VIII of 1921 does not arise.

In the result, the appeal will be allowed and the plaintiff and the 2nd defendant will get a decree with mesne profits at Rs. 21 a month from the date of this decree and costs in both Courts from the estate of the first respondent.

The Chief Justice :—I agree.

A. S. V. *Appeal allowed.*

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1. (1911) I. L. R. 38 Cal. 468.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

P. L. A. R. M. S. Venkatachalam Chettiar by agent Kadiresan Chettiar (dead) and another *Appellants** (*Plaintiff and his legal representative*)

v.

Ponnuswami Iyengar and another *Respondents* (*Defts.*)

Venkatachalam Chettiar *v.* Ponnuswami Iyengar.

Indian Contract Act, S. 91—Applicability—Commission agent and principal—Despatch of goods by rail—Absence of insurance—Usual course of business—Loss—Liability for—Legal position of parties—Interest Act—If exhaustive—Award of interest—Discretion.

A commission agent and his principal do not stand in the relation of vendor and vendee when goods have been purchased in the ordinary course of business by the former for the latter and despatched to him by rail. *Ireland* v. *Livingston,* L. R. 5 H. L. 395 ; *Cassaboglow* v. *Gibb,* (1883) 11 Q. B. D. 797 referred to. The agency contract is in some respects analogous to that of a contract of purchase and sale, as for example in the commission agent having the right of stoppage *in transitu ;* but the property in the goods passes to the principal immediately on purchase and does not depend on the manner of the delivery. S. 91, Indian Contract Act, does not in terms apply to such a case.

Where the customary method of doing business as between a principal and his commission agent was to despatch goods by rail uninsured, and on a particular consignment of goods being lost the principal could not hold the carrier responsible for safe delivery on account of the absence of insurance, the agent is not guilty of negligence and hence cannot be charged for the loss.

The Interest Act is not exhaustive of all cases in which interest is allowed. *Abdul Saffur Rowther* v. *Hamida Bivi Ammal,* (1919) I. L. R. 42 Mad. 661 followed. The award of interest is more or less a matter of discretion for the Court and not a matter of law.

Second Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 98 of 1919 preferred against the decree of the Court of the District Munsif of Kumbakonam in O. S. No. 613 of 1917.

A. Krishnaswami Aiyar for appellants.

S. Doraiswami Aiyar and *T. D. Ramiah* for respondents.

The Court delivered the following

JUDGMENT :—The original suit was to recover a sum of Rs. 1,691, principal and interest due on account of dealings by the defendants with the plaintiff in silk goods. It is not denied that the plaintiff was a commission agent in Bombay for the defendants at Kumbakonam, for the purpose of silk thread. In

*S. A. No. 655 of 1921. 15th February, 1924.

Venkatachalam Chettiar v. Ponnuswami Iyengar.

his capacity as such, the plaintiff had purchased two bundles of silk thread for the defendants and despatched them by rail to the defendants. One of them was lost on the way. The plaintiff in his present suit for the balance due in the matter of his agency account included the price of the lost bundle. The defendants repudiate liability for this and claim that it was lost through the plaintiff's negligence in not insuring the bundle as required by railway rules to ensure safe transit of all parcels of such a nature whose value is over Rs. 100. The defendants also call in aid S. 91 of the Indian Contract Act.

The District Munsif held that S. 91 did not apply to a case of a commission agent and that no negligence had been proved. The lower appellate Court held that section 91 applied and that the plaintiff had not followed its provisions and was guilty of negligence, and the loss must fall on him.

The chief point argued in appeal by the plaintiff was whether S. 91 applies to the case of a commission agent. S. 91 comes under Chap. VII, which is headed " Sale of Goods " and under the sub-heading " Delivery," and no doubt it applies to the case of an ordinary vendor and vendee. The question then is whether a commission agent and his principal stand on the same footing of vendor and vendee when goods have been purchased in the ordinary course of the agency by the commission agent for the principal and despatched to him. Defendants rely on the dictum of Lord Blackburn in *Ireland* v. *Livingston* (1) that " it is quite true that the agent who in thus executing an order ships goods to his principal, is in contemplation of law, a vendor to him.. The legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from one to the other and consequently the commission merchant is the vendor and has the right of one as to stoppage *in transitu.*" But the learned Judge goes on to point out that the contract between principal and agent is in no way superseded by this *quasi-sale*, but that " this superseded sale is not in any way inconsistent with the contract of agency existing between the parties."

This dictum has been explained in a later case by Brett, M. R. and Fry, L. J. in *Cassaboglow* v. *Gibb* (2). It is clear from the notes of argument in that case that the question was clearly raised whether, if any foreign agent has purchased

1. L R 5 H L (E & I A C) 395 at 408. 2. (1883) 11 Q B D 797.

goods from his principal and shipped them, the position of the agent to his principal is not that of vendor and purchaser. The other side there pointed out that there was no contract such as would be between a vendor and a purchaser, that the plaintiff should have the goods whether or not they were procurable and that it had never been decided that damages for any breach of duty by an agent was to be assessed on the same principle as they are in the case of a vendor and purchaser. The clear question which the Master of Rolls put to himself there was, was a breach of duty by an agent as agent not a breach of contract as vendor and, if there was a breach what damages has the plaintiff suffered thereby? And the idea that the plaintiff was entitled to get damages as though his agent was a vendor bound to supply him with the goods ordered by him was negatived. It was pointed out that Lord Blackburn "has not said that as long as the contract between principal and agent is executory, the principal can sue the agent and make him pay as though the contract was that of vendor and purchaser," and the learned Judge goes on to say, "It is obvious to my mind that the contract of principal and agent is never turned into a contract of vendor and purchaser for the purpose of settling the damages for the breach of duty of the agent." No doubt it can be argued that in that case, since the agents did not ship the goods ordered but inferior ones, they can never have been in the position as regards their consignee of a vendor; while in this case the plaintiff did send the actual goods ordered.

I can find nothing in these judgments tending to show that the legal effect of the transaction of a purchase of specified goods by a commission agent has the effect of turning his contract as between principal and agent wholly into one as between vendor and purchaser. They imply only that the agency contract is in some respects analogous to that of a contract of purchase and sale; and not identical with it, analogous in the sense that it will attract to the commission agent certain reliefs ordinarily open to a vendor, for example, the right of a stoppage *in transitu*. On the other hand property in goods specified would pass to the principal immediately on purchase by the agent. The passing of the property in the goods would not depend on the manner of delivery.

Let us take a case where the principal has definitely instructed his agent to purchase and forward specified goods by railway without the insurance insisted on by the railway as the

Venkatachalam Chettiar v. Ponnuswami Iyengar.

price of its responsibility for the carriage ; I do not imagine it would be reasonably contended that S. 91 would nevertheless apply, on the principle that the agency contract was, on consignment by the agent, wholly converted into a contract as between vendor and purchaser. Clearly the agency contract and its terms are throughout the dominating feature of the transaction and damages for loss are to be calculated on the footing of that, and not as between vendor and purchaser. I am therefore clear that S. 91, Indian Contract Act, does not in terms apply to the case. Hence if plaintiff is liable for the loss it must be on proof of negligence or proof of breach of duty as agent.

It is then argued that even if S. 91 does not apply in terms, the principle of it applies, that is, that the plaintiff as agent was bound to take reasonable care in the despatch of the goods, and that reasonable care is what has been statedly set out in S. 91, that the plaintiff having neglected to despatch the goods in such manner that his principal could hold the carrier responsible for safe delivery, is guilty of the negligence involved. Now I am clear that it cannot be laid down in all cases that the measure of reasonableness as between agent and principal is what is laid in S. 91 as the proper method of delivery as between vendor and purchaser. It has to be decided on what the parties themselves in their usual course of conduct and trade custom considered reasonable. It is in evidence here that not only before the loss but even after it the defendants have sent similar orders for silk thread valued at over Rs. 100 and have received them, sent uninsured, in the same manner from the plaintiff. The non-insurance was clearly acquiesced in by the principal prior to this loss and after it, and the plaintiff even after this loss has not received any instructions that such goods should be sent insured. I conclude the non-insurance was the implied customary method. I see no reason therefore to hold that the plaintiff is guilty of negligence in sending them in the manner, implicitly, if not explicitly, approved of by his principal, who was evidently prepared to take the risk of loss. He has implicitly told the plaintiff that he does not want the goods to be sent insured and he cannot, while refusing this to incur the cost of insurance, put the whole risk of the loss on the plaintiff and charge him with negligence in following his own implicit instructions.

Venkatá-chalam Chettiar v. Ponnuswami Iyengar.

I must therefore hold that the plaintiff is entitled to the value of the lost silk bundle and that the lower appellate Court's decision on this issue was wrong. I therefore reverse the decree of the lower appellate Court and restore that of the District Munsif on this point. Plaintiff will get his costs throughout.

There is a memorandum of cross-objections filed by the defendants that the plaintiff is not entitled to the interest decreed by the lower Courts, the contention being that he is not entitled to any interest at all. It is urged that no custom to charge interest on the agency account is alleged or proved, and that no demand for interest was made. The charging of interest is not excluded by the Interest Act which is not exhaustive of all cases in which interest is allowable. See *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (3) where the matter is discussed at length. It follows that the award of interest is more or less a matter of discretion for the Court and not a matter of law. Both the lower Courts have on the evidence come to the conclusion that there was a custom or rule of trade by which the plaintiff should get interest ; and I am not prepared to find that that conclusion is unreasonable.

I therefore dismiss the memorandum of cross-objections with costs.

T. S. V. *Appeal allowed : Cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Parvati Ammal *Appellant* (Plaintiff)*

v.

Venkatarama Iyer *Respondents (Defendants Nos. 6, 1, 2, 4 and 5.)*

Parvati Ammal v. Venkatarama Iyer.

Subrogation—Mortgage prior—Decree on—Sale in execution—Puisne mortgagee's payment to avert—Subrogation to prior mortgagee's rights—Puisne mortgagee's right to—Nature and extent of rights acquired by subrogation—Prior mortgage as mortgage charge or as decree charge—Limitation to enforce right—Suit or execution proceedings—Appropriate procedure to enforce right of subrogation in such case—Decree of prior mortgagee satisfied by puisne mortgagee's payment—Effect.

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*S. A. No. 398 of 1921. 5th February, 1924.

3. (1919) I L R 42 M 661 : 36 M L J 456.

The manager of a joint Hindu family of which defendants 2 and 3 and the husband of the 5th defendant were the other members mortgaged plaint item (1) to *S*, and subsequently assigned his half share in the plaint items to the 1st defendant, the wife of the 2nd defendant. The son of *S* sued on the mortgage to *S*, obtained a decree, and brought the property to sale in execution. The sale was held, but before confirmation, the 1st defendant raised money from the plaintiff on a hypothecation bond, the plaintiff undertaking to pay up the sale amount and release the property. The plaintiff did so and the decree was thereby satisfied. In a subsequent suit for partition brought by the 3rd defendant, to which suit the 1st defendant was made a party, but not the plaintiff, the assignment by the manager to the 1st defendant was, however, held to be a sham.

The plaintiff subsequently sued to recover her loan with interest by the sale of the mortgaged property or by a charge on item (1).

Held, that the plaintiff, as puisne mortgagee, was interested in paying off the prior mortgage, and was, by such payment, subrogated to the charge which she had paid off ; that by such payment the plaintiff was to be subrogated not merely to the prior mortgage in its original form as a mortgage charge, but to the decree charge held by the prior mortgagee, *i. e.,* the right to hold the property to sale to discharge the decree debt, that right being free of any restriction that it should be worked out within the period of limitation for the enforcement of the original mortgage ; and that, as the prior mortgagee's decree had been satisfied and was therefore unexecutable, the plaintiff was entitled to enforce his lien by way of suit.

Subrogee's rights—Nature of, discussed.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Tanjore in Appeal Suit No. 8 of 1920 presented against the decree of the Court of the District Munsif of Tiruvadi in Original Suit No. 117 of 1916.

T. R. Venkatrama Sastri and *S. Venkatarama Aiyar* for appellant.

S. Muthiah Mudaliar and *N. Swaminatha Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—One Saminatha Pillai was the head of a joint Hindu family of which defendants 2, 3 and the husband of the fifth defendant were members. He mortgaged some of the property, item (1) in the plaint, in 1902 to one Sellathachi, and in 1904 assigned his half share in the plaint items to the first defendant, who is the wife of the second defendant. The son of Sellathachi sued on the mortgage, got a decree and brought the property to sale in execution. The sale was held, but before confirmation, the first defendant raised money from the plaintiff on a hypothecation bond, the plaintiff undertaking to pay up the sale amount and release the property. The

Parvati Ammal v. Venkatarama Iyer.

plaintiff did so and the decree was thereby satisfied. In a partition suit by the third defendant in 1909, O. S. No. 41 of 1909 on the file of the Kumbakonam Subordinate Court, to which the first defendant, but not the plaintiff, was a party, that Court held that the assignment by Saminatha Pillai to the first defendant was a sham. The first defendant had therefore no interest in the property which she could transfer by mortgage to the plaintiff. The plaintiff, therefore, sued to recover her loan with interest by the sale of the mortgaged property or by a charge on item (1). The District Munsif held that the plaintiff was entitled to such a charge. The Subordinate Judge agreed with that, but interpreted the nature of the charge as a subrogation of the rights and remedies of the first mortgagee and held that, as the right of the first mortgagee to enforce the mortgage arose, on the terms of it, on 19—1—1903, a suit by the first mortgagee would at the date of the plaintiff's suit, have been barred and that therefore the plaintiff having no higher rights than that of the prior mortgagee, was likewise barred from enforcing the charge. He therefore dismissed the suit and the plaintiff has appealed.

That the plaintiff is, by her payment, subrogated to the rights and remedies of the prior mortgagee, as held by both the lower Courts, does not, to my mind, admit of doubt. As puisne mortgagee he was clearly interested in clearing the property of the prior mortgage. She is entitled to be subrogated to the charge which she has paid off. The point for decision is whether, when she paid it off, she is to be subrogated to it in its original form as a mortgage charge, or to it in the form into which it had developed, viz., the right to sell the property in discharge of the mortgage decree. I think the latter view is the correct one.

The essence of subrogation is that the party paying off a charge becomes in equity the assignee of that charge. It would seem to follow that he is subrogated to the charge in the form which it has assumed when his assignor in equity is (by a legal fiction) supposed to make the assignment. It is difficult to see how an assignment can have the effect of, so to speak, setting back the hands of the clock of evolution, and reviving a form out of which the charge has already developed, so that the charge assigned is not the charge as on the date of assignment, but some previous and outworn state thereof. It is still more difficult to adopt such a theory when the charge, out

of which the charge at the date of assignment has developed, had already vanished, not by process of development, but by efflux of time. If the charge assigned is still a charge which has become unenforceable as a mortgage charge by efflux of time, then naturally subrogation is time barred. But if it is a charge which has become unenforceable as a mortgage charge because it has developed into a decree charge, I cannot see why the party entitled to subrogation should be relegated to the unenforceable charge and denied the enforceable one. If the unenforceability of the mortgage charge as such is the test by which the right of subrogation is to be denied, it is difficult to see why a mortgage charge unenforceable at the date of assignment because it has passed into a decree, should nevertheless be held enforceable by a subrogee, while a similar charge unenforceable at the date of assignment because of efflux of time, is not enforceable by the subrogee. The logical result of such a theory would be that in all cases where a mortgage charge has ripened into a decree, and the property has been saved from Court sale to the mortgagors by the discharge of the decree debt by means of a fresh mortgage, there can be no subrogation and such a method of discharging a mortgage decree debt would no longer be feasible for the judgment-debtors.

It appears to me then that the proper doctrine is that the subrogee—or assignee in equity—steps into the shoes of the prior mortgagee at the point where he is standing, and takes over whatever rights and remedies he possesses at the moment when his lien on the property is paid off. The view of the Lower Appellate Court is no doubt supported by two rulings, *Sreemati Raghumani Devi* v. *Mukandalal Bandopadhyaya* (1) and *Sichanand Misra* v. *Gajmohan Lal* (2). The former recognises that its view is bound to produce hardship in certain cases. The view set out in these cases seems to me also one of difficulty. It would appear to involve the proposition that the assignee in equity takes something less than the rights of his assignor, since in the hands of the assignor the mortgage charge has taken on a new lease of life through the decree, while in the hands of the assignee it may be already dead. In the Privy Council case *Mahomed Ibrahim Hussain Khan* v. *Ambila Pershad Singh* (3), the mortgage charge when paid off had not ripened into a decree, and is thus hardly in point. In

1. (1920) 25 C W N 283. 2. (1922) 68 I C 707.
3. (1912) I L R 39 C 527 22 M L J 468 (P C).

Parvati Ammal v. Venkatarama Iyer.

a case like the present, where there are no equities in favour of the mortgagors, who are hoping, without paying a pie towards the discharge of the prior mortgage, to take the property wholly free of it, I am not prepared to follow the doctrine laid down in the above two cases. As I have stated, I find it difficult to see how, when a mortgage is no longer alive as a mortgage but has suffered a change into a decree for sale, and cannot therefore any longer be enforced as a mortgage by the prior mortgagee it is nevertheless alive as a mortgage and enforceable as such by the puisne mortgagee who has paid it off in its shape as a decree debt, or how that payment can reverse the process of conversion it has passed through and revive it again as a mortgage charge. I hold therefore that plaintiff is subrogated to the decree charge held by the prior mortgagee, *i. e.*, the right to hold the property to sale to discharge the decree debt ; and that right is free of any restriction that it should be worked out within the period of limitation for the enforcement of the original mortgage.

The other side contends that the mere payment will not avail in this case to create a charge in favour of the plaintiff. I do not agree. Let us suppose that the 1st defendant had herself found the money to satisfy the decree from her own funds and had herself thus averted the sale. The property would have come to her then. In the partition suit the 1st defendant, who pleaded that the assignment to her was no sham, would certainly have been entitled in that suit, when the assignment was held to be a sham, to a refund, by way of charge on the property, of the money paid from her own funds to save the property. It is difficult to see how the plaintiff, her mortgagee, can be in a worse position than she ; and, if the first defendant could, had she paid off the mortgage with her own funds, in the partition suit have been given a charge on the property for the amount paid by her, the plaintiff, who ought to have been a party to the partition suit and was not, would in that suit, had she been made a party, have been given a charge of the same nature as the charge to which the first defendant would have been entitled had she spent her own money in saving the property to the family.

On this part of the case, the appellant has relied strongly on a Privy Council case in *Sukhi* v. *Ghulam Safdar Khan* (4),

4. (1921) I. L. R. 43 All. 469 : 42 M L J 15 (P C).

and that case certainly bears analogy to the present case. There the owners by succession to the equity of redemption and the rights of the first mortgagee had mortgaged both to the plaintiff and held these up as a shield in a suit by the puisne mortgagee to enforce his mortgage, to which suit the plaintiff was not a party. The plaintiff on the date of the suit by the second mortgagee had parted with her ownership rights and held only the third mortgagee's rights over the property. The Privy Council held that the plaintiff ought to have been made a party to the suit by the second mortgagee as well as the plaintiff's mortgagors, who were in the shoes of the first mortgagee and held the equity of redemption, and that, as she was not made a party she must in her suit to enforce her mortgage be relegated to the rights she would have been entitled to enforce in the second mortgagee's suit if she had been made a party to it ; and the Privy Council held that she was entitled to enforce her mortgage to the extent of the amount to which her mortgagors were benefited by the decree in favour of the second mortgagee in his suit, since she would have been, under her own mortgage, entitled to enforce it up to that extent at least against her mortgagors in the second mortgagee's suit.

I think the principle of this case applies to the present. In their partition suit the present respondents were not entitled to ignore the assignment to the first defendant before the Court had set it aside and omit to include in that suit the mortgagee of the property under 1st defendant, viz., the plaintiff. Plaintiff is therefore entitled to be put in the position she would have been in had she been a party to that suit. I must take it that, since the first defendant fought for the genuineness of the assignment, the Court would have held against it even if the plaintiff had been there to support it. On that finding would the Court then have granted the plaintiff a charge on the property to the extent of the amount she paid to discharge the mortgage decree on the property ? I can see no valid reason why it should have refused that. The plaintiff was obviously then a person interested in the discharge of the prior mortgage and would in that suit have been properly subrogated to the right of recovering what she had paid to satisfy the prior mortgage decree and if the present respondents in their partition suit wished to divide the property free of that encumbrance, it would have been incumbent on them to free it by payment to the plaintiff of the amount which she had paid in order to free

Parvati Ammal v. Venkatarama Iyer.

the property. The plaintiff must now therefore, as far as can be done, be relegated to the position she would have held and be held entitled to the relief she would have been entitled to, had she been made a party to the partition suit.

I hold, therefore, that the plaintiff is entitled to a charge on the whole of item (1) of the plaint property to the extent of the amount paid by her for the cancellation of the Court sale.

The only other question is whether plaintiff was entitled in law to enforce this lien by way of suit or whether she ought to proceed by way of execution from the point at which the prior mortgagee left off. I am of opinion that the proper procedure was by way of suit. The decree had been satisfied in the execution proceedings, and no one can execute a satisfied decree, see *Sundara Reddiar* v. *Subbiah Koundan* (5) and *Gopi Narain Khanna* v. *Bansidhar* (6). The fact that the person claiming to execute the decree was in the latter case a defendant in the suit does not seem to me to affect the general principle laid down in these cases.

The Second Appeal is therefore allowed. I reverse the decree of the lower appellate Court and restore that of the District Munsif, interest at 6 per cent. being continued up to the date of payment. The plaintiff will get her costs throughout on the amount decreed from the contesting respondents, defendants 2 and 6, who will get costs from her throughout on the amount disallowed.. The sixth defendant's memorandum of objections is dismissed with costs.

A. S. V. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the Chief Court of the Punjab.)

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND MR. JUSTICE DUFF.

P. C.

Behari Lal-Bulaki Ram v. Kundan Lal.

Behari Lal-Bulaki Ram *Appellant**

v.

Kundan Lal and another *Respondents.*

Company—Winding-up—Orders in—Jurisdiction —Additional District Judge to whom functions of supervising liquidation has been assigned by District Judge—Jurisdiction of—Punjab Courts Act, 1888, S. 6—Effect.

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*P C Appeal No. 17 of 1922. 28th July, 1922.

5. (1912) 24 M L J 28. 6. (1905) I L R 27 All 325 (P C).

Under the Indian Companies Act of 1882 and that of 1913 the District Judge has jurisdiction to make all orders in the winding-up of a company And when the District Judge assigns to an Additional District Judge all the functions of supervising the liquidation, the Additional District Judge has, by virtue of S. 6 of the Punjab Courts Act, 1888, jurisdiction to make all such orders.

Company—Winding-up—Sale by Official Liquidator—Sanction by Court of—Order granting—Setting aside of, on appeal—Propriety—Sale best thing under circumstances—Effect.

An order approving and sanctioning a sale by the Official Liquidator in the course of the winding-up of a company ought not to be quashed in appeal if the sale which the Judge of first instance had effected was the best thing that could be done under the circumstances.

Privy Council—Appeal—Costs of—Successful appellant—Disallowance of costs to—Respondents unrepresented to appellant's knowledge—Delay in bringing appeal to hearing to consult appellant's interest as to advisability of prosecuting appeal.

Where the appellants in an appeal to the Privy Council, who must have been aware for some time that no appearance would be entered for the respondents and were therefore in a position to bring on the case *ex parte*, greatly delayed before bringing it on, because they wanted to see whether by reason of changes in commerce it was profitable to them to prosecute the appeal and get the order of the Court below set aside, their Lordships, while allowing the appeal, disallowed to the successful appellants the costs of the appeal to His Majesty.

Appeal from the judgment of the Chief Court, Punjab (31st July, 1918) reversing an order of the District Judge, Delhi (15th March, 1918).

L. de Gruyther, K. C. and *Abdul Majid* for appellant.

July 28, 1922. The Judgment of their Lordships was delivered by

Lord Phillimore.

LORD PHILLIMORE :—This is an appeal from an order of the Chief Court of the Punjab made in the matter of the winding-up of the Diamond Jubilee Flour Mills Company, and reversing an order of the Additional District Judge at Delhi.

In the course of the proceedings in the Chief Court a point was raised which the Judge thought it unnecessary to decide; but which in their Lordships' view should be decided. It was contended on behalf of the creditor objecting to the order in question, that the Additional District Judge had no jurisdiction, and that all orders made in the winding-up of a company must be made by the District Judge. Their Lordships think that this is not so.

When this matter began, the Indian Companies Act of 1882 was in force, but as it progressed the existing Act, being the Indian Companies Act, 1913, came into operation. For

P. C.

Behari Lal-Bulaki Ram v. Kundan Lal.

Lord Phillimore.

this purpose, however, the two Acts are so similar that no distinction need be made.

It is not disputed that under the Act the District Court has jurisdiction, the only question is whether that jurisdiction is confined to the District Judge or can be exercised also by an Additional District Judge.

This matter appears to be settled by the Punjab Courts Act, 1888, which by S. 6 provides as follows :—

"The following section shall be added to the Punjab Courts Act, 1884, namely :—

75. (1) When the business pending before any Divisional Court consisting of one Judge, or before the Court of any District Judge, requires the aid of an Additional Judge for its speedy disposal, the Local Government may appoint to the Court an Additional Divisional Judge or an Additional District Judge, as the case may be.

(2) An Additional Judge so appointed shall discharge any of the functions of a Divisional Judge or District Judge, as the case may be, which the Divisional Judge or District Judge may assign to him, and shall, as regards the discharge of those functions and subject to the provisions of the next following sub-section, be deemed, for the purposes of this Act, to be a Divisional Judge or District Judge. "

There is no doubt that the District Judge had assigned to the Additional District Judge all the functions of supervising this liquidation. He discharged these functions apparently without any objection for a considerable time and made many orders ; and no point was taken till this appeal was made at an advanced stage of the liquidation. He had jurisdiction, and the question which remains to be decided is the propriety of the order which he made.

The facts of the case are these. The company was insolvent ; it had as a large secured creditor the Bank of Upper India, which was also in liquidation. The company was ordered to be wound up on the 31st July, 1914. On the 16th September, 1916, the Official Liquidator with the sanction of the Judge let the Mills to the present appellants, for a term of three years from 1st January, 1917, at a rent of Rs. 16,000 per annum. In the lease it was provided that if the lessor at any time proposed to sell he should give a six months' notice, and pay Rs. 5,000 by way of compensation ; and if the lessees wanted to put an end to the lease, they could take similar action.

P. C.

Behari Lal-Bulaki Ram v. Kundan Lal.

Lord Phillimore.

On the 12th June, 1917, a notice in accordance with the lease lastly mentioned was given with the sanction of the Court, informing the lessees that it was proposed to sell and giving them notice to quit on the 31st December. When the Liquidator of the Bank knew of this, he protested against the action of the Liquidator of the Company who thereupon entered into negotiations with the lessees for a withdrawal of the notice. The latter found themselves in a strong position. Having regard to what afterwards happened it was probably to their interest that the lease should stand. On the other hand, if the lessors were hesitating and did not want to pay the Rs. 5,000 fine, firm action on the part of the lessees might extract very favourable terms. In the end, the Liquidator arranged with the lessees that he should be allowed to withdraw the notice upon terms that he gave up his power of terminating the lease, and on certain other terms favourable to the lessees.

The Bank, while welcoming the withdrawal of the notice, protested against any alteration of the terms of the lease ; and then the matter came before the Judge. He noted the following order made on the 8th October, 1917 :—

"It is not my intention to sell the Mills at present. In the present state of the money market it would be a foolish proceeding. Under para. 6 of the lease, notice can only be given when there is an intention to sell. There being no intention to sell, the notice already given should be and has to be treated void."

On the 19th the Liquidator of the Company and the lessees came before the Judge, and he, considering the proposal in view of the interests of the Company, agreed with some variation to the terms which the Liquidator had provisionally made, the important term being that the Liquidator lost his power of putting an end to the lease. For some reason the Judge did not have the order finally drawn up, or the agreement registered, but thought it might wait for a month.

The Liquidator of the Bank now changed his view. He had a report from an expert to the effect that no better time than the present could be chosen for the disposal of the property provided it could be sold free from the incumbrance of occupancy, and he went on to suggest a sale, and as his suggestion was not accepted, to file a formal petition on 1st January, 1918. To this the Liquidator of the Company made a reply, and the Judge thereupon made this order on the 21st January :—

P. C

Behari Lal-Bulaki Ram
v.
Kundan Lal.

Lord Phillimore.

"I think before I decide definitely as to the sale of the Mills there should be some indication of what price is likely to be realised by the sale of the Mills. Is there likely to be any purchaser? At the same time, I quite realise that the Bank as a secured creditor is not receiving what it should from its security. The income from its security is being diverted to the payment of unsecured creditors, which to me does not appear quite equitable.

"I direct that the Official Liquidator advertise the sale of the Mills and invite offers. Report in a month."

The Liquidator sent out the advertisement, and various tenders came in, one ultimately going as high as Rs. 2,20,000, but all these tenders were subject to the condition that possession of the Mills should be made over at an early date; and in particular the highest tender required possession within a month "free from all disputes."

These conditions rendered all the tenders useless. The lessees were under the original lease entitled to six months' notice; under the amended arrangement, they were entitled to stay if they desired till the 1st January, 1920. It might be possible to upset the subsequent arrangement as it had never been formally completed, and possibly the order of the Judge, whenever it was drawn up, might be appealed from. But any purchaser wishing to get free from this amended arrangement would see a prospect of certain litigation in front of him.

The business position had either been all along, or had by this time become, different from that which the Judge had conceived it to be, when he put aside the idea of a sale altogether. Money might be scarce, but the War had made the importation of machinery into India impracticable, there was a great demand for machinery, and there were likely to be several competitors for the Mills, but only on terms that they could get immediate or early use of the machinery. In this state of things the lessees had got the whip hand. Eventually, the Judge came to this conclusion, which he stated in the judgment of the 28th February as follows:—

"Looking at the case from all these points of view, I think the best course will be to give the lessees an option of purchase before taking any definite line. Are they prepared to make a reasonable and fair offer for the Mills? If so, I will consider the offer and then decide."

P. C.

Behari Lal Bulaki Ram *v.* Kundan Lal.

Lord Phillimore.

Thereupon the lessees offered Rs. 1,50,000. The Judge said "Make it Rs. 1,75,000," and they did. Some creditors then said that the property was worth from 1 1-2 to 3 lakhs of rupees, and they would like a public auction. The Judge pointed out that possession could not in any circumstances be given till the expiry of six months, and that it was possible that the possession might be indefinitely postponed if the lessees insisted on their rights, and he adjourned the matter to see whether in that state of things anybody would make a better offer.

On the 15th March, he had a further sitting, but no one came forward to make any offer on the terms indicated, and he, therefore, approved and sanctioned the sale to the lessees for Rs. 1,75,000. It is from this order that the appeal was made to the Chief Court.

The learned Judge of the Chief Court in dealing with the case expressed himself in somewhat severe terms as to the unwisdom of the withdrawal of the six months' notice, which would have enabled a sale at the beginning of 1918, and of the subsequent concession made to the lessees. It was not unreasonable that he should make these comments, but after all, these matters were past cure, and what he had to determine was whether *rebus sic stantibus* the sale to the lessees which the Judge of first instance had effected was the best thing that could be done. He proceeded to complain of the action of the Judge in explaining to possible purchasers the conditions under which they would have to purchase, and said that the mode of explanation was unduly deterrent. But again, in their Lordships' opinion, the learned Judge of the Chief Court failed to face the facts. However unfortunate they were, there they were. No one suggested that it was a mistake to have a sale at all, and if there was to be a sale, it could only be on terms that the purchaser must take the property with all the burdens of the lease, and the further burden of any subsequent rights which the lessees had obtained. If the learned Judge in the Chief Court had put this question before himself, their Lordships think he would never have quashed the decision of the Judge of first instance, and this decision their Lordships think must be restored.

There remains a question which has given their Lordships some trouble, the question of costs. The appellants, the lessees who had been made parties to the proceedings in the Chief

P. C.

Behari Lal-Bulaki Ram v. Kundan Lal.

Lord Phillimore.

Court, were entitled to come to His Majesty in Council and have the erroneous decision of that Court reversed. The party who procured that erroneous decision was a creditor, or rather, for he also was in liquidation, the Receiver of that creditor's estate. He has not appeared to support the order which he obtained, and in an ordinary case he ought to pay the costs of the appeal to His Majesty, if there is any estate out of which they could be paid.

But there are special circumstances. The appellants must have been aware for some time that no appearance was going to be entered for the respondents, and being in a position to bring on the case *ex parte,* they appear to have greatly delayed before bringing it on. The decision of the Chief Court was dated the 31st July 1918, and this case was not set down for hearing till the 26th May, 1922. During almost all that time the appellants were in the following position. If for commercial reasons it suited them to accept the order of the Chief Court to hold the premises during the remainder of their lease, and then get out of what might by reason of changes in commerce be a bad bargain, they were in a position to do so by abandoning their appeal. If, on the other hand, it suited them, as apparently it has suited them, to re-establish their sale, they had only to bring their case to a hearing.

In these circumstances, there is no hardship in making them bear their costs of the appeal to His Majesty.

Their Lordships will, therefore, humbly recommend His Majesty that this appeal should be allowed, that the order of the Chief Court should be discharged, and that the order of the Additional District Judge at Delhi should be restored, and that there be no costs of this appeal.

Solicitors for the appellant: *Ranken, Ford* and *Chester.*

Appeal allowed.

PRIVY COUNCIL

(On Appeal from the High Court of Judicature at Patna.)

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, LORD CARSON AND SIR JOHN EDGE.

Rai Radha Kishun and others — *Appellants**

v.

Jag Sahu and others — *Respondents.*

P. C.

Rai Radha Kishun *v.* Jag Sahu.

Hindu Law—Widow—Mortgage by—Suit to enforce, against reversioner—Plea by him of no necessity for bond—Scope of—Plea of no necessity for high rate of interest if included—Onus on mortgagee of proving such necessity—Shifting of onus—Conditions—Evidence of necessity for high rate of interest—Borrowing by same widow on other occasions at high interest if.

A *purdanashin* lady, who had only a widow's right in certain property, executed a mortgage in respect thereof for Rs 775 with compound interest at 24 per cent. and half-yearly rests. In a suit brought, after the lady's death, to enforce the mortgage bond against the reversionary heir who had succeeded to the property, the defendant raised a plea as follows :—

"The bond sued upon is entirely illegal and without passing of consideration and is without legal necessity."

Held, that the plea in general terms opened the defence that there was no necessity to borrow at the high rate of interest provided for in the bond, and that the onus of proving that there was such necessity lay on the lender.

Held further that, as in all questions of onus, a certain amount of evidence might cause the onus to shift, and that evidence on the lender's part that the money could not, in the circumstances, have been raised at less interest would suffice to shift the onus so that, if the defendant led no evidence to controvert that statement, the lender would prevail, but that when there was no evidence and it was evident on the face of the document that the interest charged was far in excess of commercial rates, then undoubtedly the lender had not discharged his task.

Held also that evidence that on one other occasion the same widow had borrowed at high interest was not in any way conclusive as of what she might have done on the occasion in question.

The only evidence tendered by the plaintiff before the trial Judge consisted of two bonds granted by the same widow borrowing at a high rate of interest and decree obtained on one of the bonds, and of a witness to speak to the execution of one of the bonds, was rejected by the trial Judge as unnecessary. *Held,* that the trial Judge acted rightly in so doing.

Appeal from a judgment and decree of the High Court of Patna (23rd March, 1920) which varied a judgment and decree of the Subordinate Judge of Muzafferpur (26th March, 1917).

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*P C Appeal No. 51 of 1923. (Patna Appeal No. 34 of 1920). — 30th May, 1921.

P. C.

Rai Radha Kishun v. Jag Sahu.

One Gudar Sahai, who died on the night of the 12th March, 1897, left considerable landed property. His only son, who died in May, 1890, married Musammat Sahodra Kuar, by whom he had a daughter, named Bhaban. The first wife of Gudar Sahai died in October, 1891, and he then married Musammat Bachu Kuar in June, 1892. Musammat Sahodra Kuar, the daughter-in-law, instituted legal proceedings against the young widow, Musammat Bachu Kuar, for probate of a will alleged to have been left by Gudar Sahai, deceased ; but on the 23rd August, 1897, the District Judge of Lilah Terhoot as there was no witness to the alleged will of Gudar Sahai, dismissed the application, with costs. This decision was upheld on appeal by the judgment of the High Court of Calcutta on the 25th January, 1900. Musammat Sahodra Kuar then continued to carry on various other civil and criminal proceedings against Musammat Bachu Kuar, until the latter gave her a maintenance grant in 1904. Although the annual income from the estates left by Gudar Sahai was about a lakh of rupees, the prolonged litigation from 1897 to 1904 was a heavy burden upon the estates, besides which Gudar Sahai himself left debts amounting to about five lakhs. On the 21st October, 1902, Musammat Bachu Kuar as malik and possessor of Gudar Sahai's estate executed a mortgage-bond in favour of Harakh Das and Tulsi Das to secure the repayment of Rs. 775 with compound interest at the rate of Rs. 2 per mensem, with half-yearly rests, covering the following loans :—

(1) Rs. 125 to Dr. Leakat Hussain on a promissory note executed in his favour on 1st October, 1902 for medical attendance and drugs ;

(2) Rs. 204 due to Damri Das on a promissory note for lodging expenses

(3) Loan of Rs. 275 taken from Damri Das ;

(4) Rs. 171 received in cash at the time of the execution of the mortgage-bond.

On the 13th February, 1905, Harakh Das and Tulsi Das transferred this mortgage-bond to Muni Lal Sahu who, having provided the consideration money from the joint fund of the family, became associated with his brothers, Jag Sahu and Ram Khelawan Sahu, as joint holders of the deed. Ram Khelawan Sahu having died, an order was passed on the 21st November, 1916, declaring as his heirs, Jag Sahu and Muni Lal Sahu, the present respondents.

P. C.

Rai Radha Kishun v. Jag Sahu.

Upon the death of Musammat Bachu Kuar, the estates passed to her daughter and heiress of Rai Gudar Sahai, Musammat Bhagwati Kuar. The latter died without issue, and thereupon Rai Mahabir Prasad (now deceased), father of the present appellants, being the nearest reversionary heir, succeeded to the said estate.

Jag Sahu, Muni Lal Sahu, and the brother Ram Khelawan Sahu (since deceased), on the 10th November, 1915, filed the present suit against Rai Gudar Sahai in the Court of the Subordinate Judge, Muzafferpur, claiming Rs. 14,500 with interest until realisation as the amount due and owing on the mortgage-bond and, failing payment, a decree for sale of the mortgaged properties.

The defendants by their written statement filed on the 16th March, 1916, denied that the plaintiffs had any right of action, and pleaded limitation as a bar, and continued as follows:—

"These defendants do not admit the execution and passing of consideration of the bond sued upon. So far as the defendants have learnt on enquiry, the bond was not executed with the information and consent of Musammat Bachu Kuar.

"The bond sued upon is entirely illegal and without passing of consideration and is without legal necessity. The necessities mentioned thereln and the necessities alleged by the creditors are not true and correct.

"The bond sued upon and the mortgage lien, mentioned therein, are not binding upon the estate of Rai Gudar Sahai, nor are they binding upon these defendants, nor was it executed for meeting legal necessities.

"The rate of simple and compound interest is, altogether, contrary to law and equity and is altogether, improper. It is never fit to be enforced in any way nor are the plaintiffs entitled to get the same.

"Moreover these defendants beg to submit that the estate of Rai Gudar Sahai is not and cannot be bound by such a heavy rate of interest especially after expiration of such a long period the rate of simple and compound interest cannot be allowed.

"The plaintiffs are never entitled to recover such amount of money as claimed by them and the account of the amount in claim is wrong."

The following issues were framed on the 25th April, 1916:—

(1) Whether the plaintiffs have a right or cause of action?

"(2) Whether the suit is barred by limitation?

"(3) Whether the *Bechnama*, dated the 13th February, 1905, is genuine, for consideration, valid and operative?

"(4) Whether the bond in suit, dated 21st October, 1902, is genuine, for consideration and legal necessity and binding on the estate of the late Rai Gudar Sahai?

P. C.

Rai Radha Kishun v. Jag Sahu.

(5) Whether the rate of interest and stipulation regarding compound interest are legal and enforceable ?

(6) To what relief, if any, are the plaintiffs entitled ?"

The Subordinate Judge (Raj Kishore, Esq.) delivered judgment on the 26th March, 1917 in which, after holding that the suit was instituted in time and not barred by limitation, and that the deed of assignment was a *bona fide* document, that the bond was duly executed by Bachu Kuar, who received in cash Rs. 171, and rightly allowed the balance to be set off against antecedent debts owing by her ; that disputes between Bachu Kuar and Sahodra were going on at the time of the execution of the bond, and that on that account collections could not regularly be made on behalf of Bachu Kuar ; that Bachu Kuar's husband died heavily indebted, and that there was pressure on the estate and need of loans about the time the bond was executed, he continued as follows :—

"It follows therefore that only Rs. 125 and Rs. 204, or Rs. 329 out of the amount covered by the bond, was borrowed for legal necessity.

"*Issue No.* 5.—The amount covered by both the handnotes (Exs. 1 and 2-*a*) carried interest at 2 per cent. per month. The bond in suit was executed only a month or so after the execution of these handnotes and there is absolutely no evidence adduced by the plaintiff to show that pressure for repayments of the amounts due on them was so great as to compel Bachu Kuar to agree to pay compound interest at 2 per cent. with six-monthly rest. Compound interest at this rate seems to be very high and the extent of its exorbitancy can be well gauged by the fact that Rs. 775 has run to Rs. 14,500 from October, 1902 to November, 1915. To make the defendants liable for such exorbitant interest the plaintiffs were bound to prove that Bachu Kuar could not get money at a lower rate but this they have not done. See *Harmanoje Narain Singh* v. *Ramprosad Singh* (1). I would therefore allow simple interest at 24 per cent. per year as stipulated for by the notes (Exhibits 1 and 2).

"*Issue No.* 1.—In view of the above findings there can be no room for doubt that plaintiffs are entitled to sue the defendants. In the result the suit is decreed in part for Rs. 329 with interest at Rs 2 per cent. per month from the date of the bond up to 6 months hence. If the decretal amount is not paid in six months the mortgaged property will be liable to be sold for its satisfaction. The plaintiffs will get their proportionate costs to the extent of the claim allowed. The contending defendants will get Rs. 200 as their own costs for the amount of claim disallowed. I allow this cost to the defendants as they have substantially succeeded and the plaintiffs appear to have waited till the last moment with the ostensible object of allowing the claim under the bond to accumulate to a heavy amount.

"The decretal amount will carry at six per cent. per year."

From this judgment and decree an appeal was preferred by the plaintiffs, and a memorandum of cross-objection by the

1. (1907) 6 C L J 462.

P. C

Rai Radha Kishun
v.
Jag Sahu

defendants to the High Court at Patna (Das and Adami, JJ.) who, on the 23rd March, 1920, allowed the appeal in part, by granting compound interest at 2 per cent. per mensem, instead of the simple interest decreed by the Court below. The judgment of Adami, J., concluded as follows :—

"We thus uphold the findings of the lower Court with regard to all four of the items.

We finally come to the question whether the lower Court was right in reducing the interest from compound to simple interest. The learned Subordinate Judge held that it lay on the plaintiff to prove that the pressure on the estate was so heavy, and the difficulty of getting money at a less rate of interest was so great, that the compound interest agreed on in the bond was reasonable. He relied on *Harmanoje Narain Singh* v. *Ramprosad Singh* (1).

In the case of *Nazir Begum* v. *Rao Raghunath Singh* (2), their Lordships of the Privy Council decided that it is incumbent on those who support a mortgage made by a manager of a joint Hindu family to show not only that there was a necessity to borrow but that it was not unreasonable to borrow at a high rate of interest, and that decision has been followed by the Allahabad High Court in *Makrand Singh* v. *Kallu Singh* (3). The same principle would apply even more in the case of a mortgage by a Hindu widow.

In the case of *Premsukh Dass* v. *Rambhujawan Mahton* (4), my learned brother, sitting with Coutts, J., considered the case of *Nazir Begum* v. *Rao Raghunath Singh* (2), and pointed out that there the want of necessity for the high rate of interest was put forward in the written statement of the defendants, and held that the ruling of the Judicial Committee applied where want of necessity was pleaded.

We have then to look at the written statement of the defendants. There they aver that "the rate simple and compound interest is altogether contrary to law and equity and is altogether improper. It is never fit to be enforced in any way nor are the plaintiffs entitled to get the same. Moreover, the defendants beg to submit that the estate of Rai Gudar Sahai is not and cannot be bound by such heavy rate of interest, especially after expiration of such a long period the rate of simple and compound interest cannot be allowed."

This is not an averment of want of necessity for the high rate of interest. It is a contention that the interest is unconscionable, and it has not been found to be such. There is in fact no plea in the written statement that there was a want of necessity for the high rate of interest and there was no issue framed on this point.

Under the circumstances, following the ruling of this Court in the case of *Premsukh Dass* v. *Rambhujawan Mahton* (4), we must hold that, in the absence of a plea by the defendant that there was no necessity for compound interest, the lower Court was wrong in holding it incumbent on the plaintiff to prove that there was necessity and that the rate was unreasonable.

As a result, the cross-objection is disallowed, and the appeal allowed in part. The decree of the lower Court will be modified to this extent that in

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1. (1907) 6 C L J 462.
2. (1919) I L R 41 All 571 36 M L J 521 (P C).
3. (1919) I L R 41 All 581. 4. (1919) 1 Pat L T 34 52 I C 964.

P. C.

Rai Radha Kishun *v.* Jag Sahu

place of simple interest at 2 per cent. per mensem compound interest at the rate claimed will be allowed. The appellants will get costs proportionate to their success.

The defendants appealed to His Majesty in Council, and the plaintiffs at the hearing of the appeal prayed for leave to adduce in evidence other mortgage-bonds executed by Musammat Bachu Kuar at similar rates of interest, which the Subordinate Judge had refused to admit as evidence.

Kenworthy Brown for appellants :—The Subordinate Judge was right in holding there was no legal necessity for the widow to borrow at 24 per cent. compound interest with half-yearly rests, and the High Court erred in holding that the question for such legal necessity was not open for consideration. If the question was not sufficiently raised on the pleadings and issues, the same should have been amended. In any case, interest at such rate (24 per cent.) is not allowable after action brought, or, at the latest, after the date fixed by the Subordinate Judge's decree for redemption. The mortgagor was a *purdanashin* lady, and there is no sufficient evidence that the stipulation as to interest was properly or at all explained to her, or that she was advised thereon.

T. B. W. Ramsay for respondents :—There is no *onus* upon the plaintiffs to prove the necessity for the interest charged or that it is reasonable. The defendants not having specifically raised in their written statement the question of necessity of the rate of interest charged, the matter did not arise. The Subordinate Judge erred in decreeing simple interest only, instead of the compound interest stipulated in the deed. In any event, so far as further evidence may be necessary, the respondents now pray in their petition to be allowed to call evidence (other mortgages by the widow) excluded by the Subordinate Judge.

30th May, 1924. The Judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN :—The present action was brought to enforce a mortgage on the family estate which had been executed by a *purdanashin* lady, now deceased, who had had a widow's right in the said estate. The mortgage bore to be for Rs. 775 with compound interest at 24 per cent. and half-yearly rests.

P. C.
Rai Radha Kishun v. Jag Sahu.
Lord Dunedin.

The Subordinate Judge held that the mortgage was enforceable only as to Rs. 329. Necessity as to the remainder not having been proved, he decreed for Rs. 329 as principal and for interest at only 24 per cent. simple. This brought out the interest at Rs. 1,178-12-9. The High Court agreed as to the principal but held that compound interest should be charged. which brought out the total sum at Rs. 18,548-11-4.

The view of the learned Subordinate Judge is concisely expressed in his finding on the 5th issue. He says :—

"*Issue No.* 5.—The amount covered by both the handnotes [Exs. 1 and 2 (*a*)] carried interest at 2 per cent. per month. The bond in suit was executed only a month or so after the execution of these handnotes and there is absolutely no evidence adduced by the plaintiff to show that pressure for repayment of the' amounts due on them was so great as to compel Bachu Kuar to agree to pay compound interest at 2 per cent. with six-monthly rest. Compound interest at this rate seems to be very high and the extent of its exorbitancy can be well gauged by the fact that Rs 775 has run to Rs. 14,500 from October, 1902, to November, 1915. To make the defendants liable for such exorbitant interest the plaintiffs. were bound to prove that Bachu Kuar could not get money at a lower rate but this they have not done [*Harmanoje Narain Singh* v. *Ramprosad Singh* (1)]. I would, therefore, allow simple interest at 24 per cent. per year as stipulated for by the notes (Exs. 1 and 2).

The learned Judges of the High Court reversed because, in their opinion, there was no specific statement in the defendants' pleading raising the question of the necessity for the rate of interest and that, therefore, the Subordinate Judge was wrong in going into the matter.

This point has, in their Lordships' view, been clearly decided by the Board. Turning to the pleadings in this case the defendants, in their written statement, allege as follows :—

"The bond sued upon is entirely illegal and without passing of consideration and is without legal necessity."

Now, in the case of *Nazir Begum* v. *Rao Raghunath Singh* (2), the judgment of the Board is as follows, at p. 148

"In the written statement applied on behalf of the defendants one of the points taken was that the property mortgaged was ancestral property and that there was no legal necessity to execute the document sued upon. In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the defendants to contend that though the necessity for borrowing the principal sum was accepted there was no necessity to borrow on the very onerous terms of this mortgage. This line of defence being thus open to the defendants the pleas laid down by this Board in *Rajah Huronath Rai Chowdhri* v. *Rundhir Singh* (7) and in *Nand Ram* v. *Bhupat Singh* (8) apply."

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1. (1907) 6 C L J 462.
2. (1919) I L R 41 All 571 36 M L J 521 (P C).
7. (1890) I L R 18 C 311.
8. (1911) I L R 34 All 126.

P. C.

Rai Radha Kishun *v.* Jag Sahu.

Lord Dunedin.

This makes clear two points. First that a plea in general terms opens the defence that there was no necessity to borrow at the high rate of interest and, second, that the onus of showing there was necessity lies on the lender. But there is further and subsequent authority. In the case of *Munna Lal, 29th July,* 1919, *not reported,* the passage just cited is repeated and affirmed and lastly, in the case of *Ram Bujhawan Prosad Singh* v. *Nathu Ram* (5), there is this passage :—

"It is not possible to say, after the decision of the Board in the case of *Nazir Begum* (2) already referred to, that a plea of no legal necessity for a loan and that the property is not at all liable for the payment of the amount claimed does not open the door for a defendant to say that the rate of interest is excessive and place on the plaintiff the onus of proving that the rate of interest is not excessive, having regard to all the circumstances which prevailed when the loan was made."

In view of these authorities their Lordships cannot consider the question as still open. A plea in general terms as here raises the question and the question being raised the onus is on the lender to prove that the necessity included borrowing on such terms. As in all questions of onus, a certain amount of evidence may cause the onus to shift, and evidence on the lender's part that the money could not, in the circumstances, have been raised at less interest would suffice to shift the onus so that, if the defendant led no evidence to controvert that statement, the lender would prevail. But when there is no evidence and it is evident on the face of the document that the interest charged is far in excess of commercial rates, then undoubtedly the lender has not discharged his task. For these reasons their Lordships are of opinion that the judgment of the High Court cannot be supported on the grounds given.

The plaintiffs' counsel urged that if this view should prevail the judgment of the Subordinate Judge should not be restored *simpliciter* but the case should be remitted for further enquiry and he called attention to the fact that certain evidence proffered was refused by the Subordinate Judge as unnecessary and that a petition to the High Court for allowance of this evidence was not dealt with as, in view of the finding of the High Court, it became unnecessary to deal with it.

Now, the evidence in question consisted of the production of two bonds granted by the same widow borrowing at a high rate of interest and decree obtained on one of the bonds, and the tender of a witness to speak to the execution of one of the

2. (1919) I. L. R. 41 All. 571 : 36 M. L. J. 521 (P. C.).
5. (1922) 44 M L J 615 50 I A 14.

P. C.

Rai Radha Kishun v. Jag Sahu.

Lord Dunedin.

bonds. Their Lordships do not think that a remit is necessary. Evidence simply that on one other occasion the widow had borrowed at high interest is not in any way conclusive as of what she might have done on the occasion in question, and as no other evidence was tendered their Lordships think that the Subordinate Judge was justified in saying, as he did, that "there is no evidence adduced by the plaintiffs to show that pressure for repayment of the amounts due on them was so great as to compel Bachu Kuar to agree to pay compound interest at 24 per cent. with a six-monthly rest."

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the decree of the Subordinate Judge restored, the appellants to have their costs here and in the Courts below.

The petition of the respondents for the admission of further evidence will be formally dismissed with costs.

Solicitor for appellants : *Hy. S. L. Polak.*

Solicitors for respondents *Barrow, Rogers* and *Nevill.*

A. de M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

T. S. Sivarama Aiyar and others *Appellants** (*Plffs.*)

v.

T. S. Gopalakrishna Chettiar (dead) and others *Respondents* (*Defts.* 1 *and* 2 *supplemental respondent*) *and* *L. R. of the first Defendant.*

Sivarama Aiyar v. Gopalakrishna Chettiar

Hindu Law—Will—Construction—Bequest to wife and daughter with right of survivorship to each other—"If a male is born to my daughter, it will inherit real property given to my wife and daughter"—Estates taken by wife and daughter and daughter's sons—Nature of—Only son of daughter born after testator's death and dying before daughter—Effect—Validity of bequest to daughter's sons—Madras Act I of 1914*—Applicability—Effect.*

The will of a Hindu provided that the lands should be managed by his brother and half the income should be enjoyed by him in his own right. The testator gave also one house to his brother. Another house and the other half of his lands were given "to his (testator's) wife and daughter with the right

*Appeal No. 141 of 1921. 25th February, 1924.

Sivarama Aiyar v. Gopalakrishna Chettiar.

of survivorship to each other, *i. e.*, wife and daughter. Lower down the testator provided "If my daughter does not beget male issue in her lifetime half the land and the house given to my wife and daughter by this will shall after their lives go to my brother and his male heirs. If a male is born to my daughter it will inherit the real property given to my wife and daughter."

The testator died in 1877; a son was born to the daughter in 1881 and the boy died after living for a day; the testator's widow died in 1903 and his daughter in 1918.

On a construction of the will, *held*, by Ramesam, J., (1) that it provided for an estate during the joint lives of the wife and daughter, to be taken by them as tenants-in-common with a remainder in favour of each for her life after the death of the other; (2) that in the events that happened, after the death of the testator's widow, the daughter took an estate for life; (3) that the daughter's sons were intended to be devisees under the will and not to succeed as on an intestacy (4) that the will gave a contingent remainder to the daughter's sons, such contingent remainder being converted into a vested remainder after the birth of the first daughter's son, subject to its diminution as the number of daughter's sons was augmented by further births; and (5) that the disposition in favour of the daughter's sons was, in the events that happened, void by the rule in the Tagore Case and was not validated by Madras Act I of 1914.

Held, by Jackson, J.:—The will made the male born to the testator's daughter heir to the real property given to his wife and daughter after their death and without any intention that the property should vest in him at birth and come to him by survivorship.

If, however, the alternative and perfectly reasonable construction is adopted, so that the property vested in the male issue from the moment of birth, the disposition is invalid and cannot be validated by the retrospective operation of Madras Act I of 1914.

Applicability of Madras Act I of 1914.

Appeal against the decree of the Court of the Second Additional Subordinate Judge of Tanjore in O. S. No. 68 of 1919 (O. S. No. 84 of 1919, Sub-Court of Kumbakonam).

S. Varadachariar for appellants.

A. Krishnaswami Iyer, M. S. Venkatrama Iyer and *T Tyagaraja Iyer* for respondents.

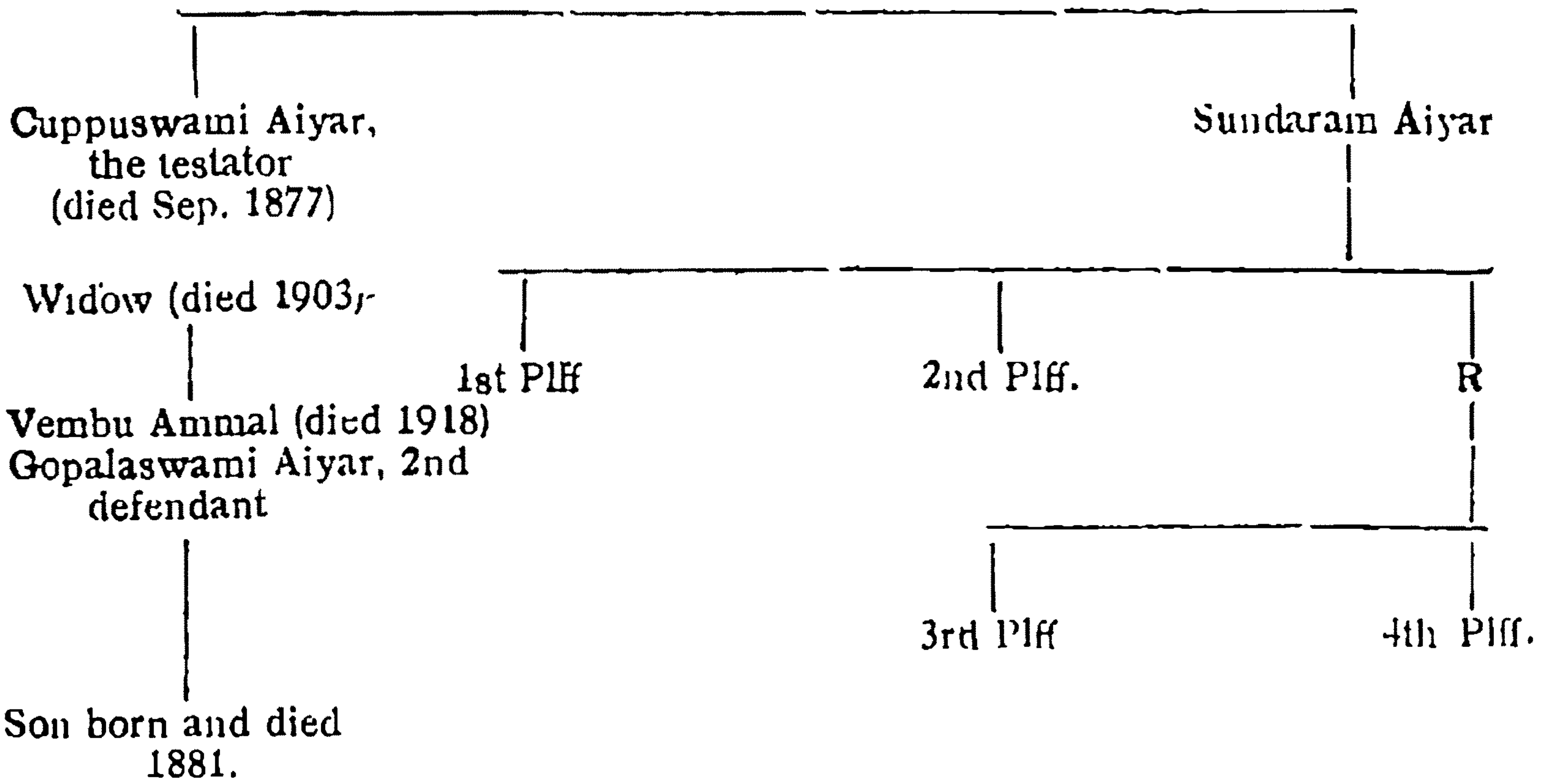
The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.*—This appeal arises out of a suit (of 1919) for possession, the plaintiffs claiming to be entitled, after the death of one Vembu Ammal, to the suit properties, of which a lease for seven years had been granted by her to the original sole defendant on 19th June, 1918. The lessee pleaded that, under the will of the last male owner Cuppuswami Aiyar, Vembu Ammal's husband, Mr. T. V Gopalaswami Aiyar is entitled to the properties after her death, and not the plaintiffs. He also contended that the

lease was binding on the remainder-man. One of the issues originally framed was "whether the suit is bad for the non-joinder of T. V. Gopalaswami Aiyar as a party to it." The case was set down for preliminary argument on this issue and on 28th September, 1920, T. V. Gopalaswami Aiyar was added as 2nd defendant in the suit. The Subordinate Judge found on the 6th issue that the lease by Vembu Ammal was not within her competency to grant. On the 11th and 12th issues, he found that the 2nd defendant (and not the plaintiffs) was entitled to the vested remainder in the suit properties after Vembu Ammal's death. He accordingly dismissed the suit. The first defendant filed an appeal against the finding on the sixth issue but we are informed that he has since become an insolvent and his appeal has not been prosecuted. The present appeal has been preferred by the plaintiffs and in this appeal, neither party questions the correctness of the finding on the sixth issue.

The following pedigree shows the relationship of the parties :—



The last male owner of the suit properties was Cuppuswami Aiyar. He died in September, 1877, leaving his daughter Vembu Ammal. His last will—about the genuineness of which there is no question—is dated 24th July, 1876. He was a pleader of the Tanjore District Court. The will is in English. His widow died in 1903 and the daughter in 1918.

Two questions arise in Appeal—(1) What is the proper construction of the will ? (2) If the construction is, as contended by the respondent, is the disposition validated by Madras Act I of 1914 ? The will (Exhibit A) provides that the lands should be managed by his brother and half the income

Sivarama Aiyar v. Gopalakrishna Chettiar.

Ramesam, J

should be enjoyed by him, in his own right. He gave also one house to his brother. Another house and the other half of his lands were given "to the wife and daughter with the right of survivorship to each other, *i. e.,* wife and daughter." Lower down he provides "If my daughter does not beget male issue in her life-time half the land and the house given to my wife and daughter by this will shall after their lives go to my brother and his male heirs. If a male is born to my daughter, it will inherit the real property given to my wife and daughter."

The will provides for an estate during the joint lives of the wife and daughter, to be taken by them as tenants-in-common with a remainder in favour of each for her life after the death of the other. In the events that happened, after the death of the widow in 1903, the daughter took the estate and it is conceded by both parties that it was an estate for her life. The question is—Did the will dispose of the remainder after the daughter's life estate? If so, what is the effect of the disposition? The respondent's contention is that the will gave a contingent remainder to the daughter's sons—the contingency being, the coming into existence of each daughter's son. He accordingly argues that, when a son was born in 1881, the contingent remainder was converted into a vested remainder when the boy died after living for a day; that it was then inherited by his mother who took the limited estate of a Hindu mother in it, and, after her, it was inherited by the 2nd defendant in 1918. It may be observed here that, at this stage we are concerned only with the construction of the will and not with the validity of such a disposition as is contended for by the respondent.

Mr. Varadachari, for the appellant, argues that the testator did not intend to make any disposition under the will in favour of the daughter's sons but intended that the Hindu Law of Inheritance should operate in favour of the daughter's sons. When the daughter died in 1918, the daughter's sons, if any, would have taken it but as only one was born and even he did not survive up to 1918 the plaintiffs took the estate. In support of this argument, he lays special emphasis on the word 'inherit' which he argues is not the same as 'take' He also contends that the words 'beget male issue in her life-time' should be construed as 'have male issue surviving her.' He relies on *Srinivasa* v. *Dandayudapani* (1), the will in which

1. (1889) I L R 12 M 411.

Sivarama Aiyar v. Gopalakrishna Chettiar.

Ramesam, J

is somewhat similar. But, as the Subordinate Judge points out, there is no disposition in favour of the daughter's son in the last case. The only bequest was in favour of the daughter who was to transmit the corpus intact to her male descendants. The words 'male descendants' were held not to be words of purchase. Wilkinson, J., construed them to be words of inheritance, while Shepherd, J. thought that the daughter got a daughter's estate and there was an intestacy after her death, leaving the Hindu Law to take effect.

This case does not therefore help us. He also refers to *Guruswami Pillai* v. *Sivakami Ammal* (2) where it was pointed out by the Judicial Committee (at p. 58) that "the words 'have issue' are often read as meaning 'leave issue' but not without some reason derivable from the will." I may at once say the appellant's contention about the construction of the expression "beget male issue in her life-time" is only another way of stating his contention about the construction of the second sentence in the clause. If the second sentence can be construed, as he contends for, as a disposition in favour of only daughter's sons who survive Vembu Ammal or as providing for the succession of the daughter's son, as on an intestacy, in either case, the plaintiffs get the property. It is immaterial what the first sentence in the clause means as, either under the will (if 'beget male issue' means leaving male issue surviving her) or otherwise, the plaintiffs are entitled. Thus, the construction of the first sentence need not detain us. It is the second sentence that has to be considered.

The question is—Does the word 'inherit' indicate that the daughter's sons were intended to succeed, as on an intestacy after the daughter's death. In *Bhagabati Barmanya* v. *Kali Charan Singh* (3) a similar contention was raised as to the Bengali words "Uttaradhikara Sutre" translated as "by rights of inheritance" and negatived by their Lordships of the Privy Council. The Chief Justice who decided the case in the High Court of Calcutta [*Bhagabati Barmanya* v. *Kali Charan Singh* (4)] explained the expression as 'aftertakers' and Lord Macnaghten concurred with it. In *Watkins* v. *Frederick and others* (5) Lord Westbury was of opinion that

2. (1895) I L R 18 M 347 5 M L J 106.
3. (1911) I L R 38 Cal 468 21 M L J 387 (P C).
4. (1905) I L R 32 Cal 992.
5. 11 H L C 358 11 E R 1371 at 1374.

Sivarama Aiyar v. Gopalakrishna Chettiar.

Ramesam, J.

the words 'to inherit' are used by the testator as equivalent simply to the word 'to take'

In *Chunilal* v. *Bai Muli* (6) the daughter was described as 'heir' in three places. Yet it was held that the will contained a disposition in favour of the daughter and the intention was not that she should succeed as heir. She pre-deceased the mother. In *Harris* v. *Brown* (7), the words "descend to the eldest son," were said to be the same as "devolve or go" and it was held that the eldest son took under the will. In *Mahomed Shumsool* v. *Shewallram* (8) their Lordships say "The testator uses the word 'heir' as signifying the person who is to take immediately in succession to another." On the whole I am inclined to agree with the respondent's contention that the daughter's sons were intended to be devisees under the will and not to succeed as on an intestacy.

Mr. Varadachari next argues that the daughter's sons were intended to take only if they were born before the testator's death. He refers to *Mann* v. *Thompson* (9) and *Dias* v. *De Livera* (10) quoted by Lord Macnaghten in *Bhagabati Barmanya* v. *Kali Charan Singh* (3). I have no hesitation in rejecting this contention. Assuming such a rule gives effect to the intention of Hindu testators also (*cf.* the Hindu Wills Act of 1870, S. 2) the exception to the rule, recognised in English Law and in Indian Succession Act, S. 99, extended by Hindu Wills Act to Bengal should be applied to Hindu wills also as expressing a rule of common sense, giving effect to intentions of testators in favour of persons described as standing in a particular degree of kindred to a specified individual "when the possession is deferred until a time later than the death of the testator, by reason of a previous bequest." Even in *Bhagabati Barmanya* v. *Kali Charan Singh* (3) the rule was not actually applied in ascertaining the intentions of the testator. The consideration that the well-known doctrine of Hindu Law (laid down in the Tagore case) that a gift to an object not in existence is absolutely void—a consideration that must have been known to the testator in the present case also—did not prevent

3. (1911) I L R 38 Cal. 468 at 472 : 21 M L J 387 (P C).
6. (1899) I L R 24 Bom 420.
7. (1901) I L R 28 Cal 621.
8. (1874) L R 2 I A 7 at 15.
9. (1854) 1 Kay 638.
10. (1879) L R 5 A C 123.

Sivarama Aiyar v. Gopalakrishna Chettiar.

Ramesam, J.

the application of the exception to ascertain the intention in that case. It is true that in that case, the disposition failed as to those born after the testator's death on account of the rule of Hindu Law governing a gift to persons not in existence at the time of the testator's death, but it took effect as to those in existence at the testator's death, the rule in *Leake* v. *Robinson* (11) not being applicable. I may also add that, in this Presidency, the rule in *Mann* v. *Thompson* (9) was not applied in *Venkayamma* v. *Narasamma* (12).

The next alternative contention of Mr. Varadachari is—even if the daughter's sons were intended to take under the will, they take only if they survive the daughter and do not take a vested estate immediately after birth. He points out that if the first son of the daughter takes a vested estate as soon as he was born other sons of the daughter would be deprived of all benefits under the will—a result not intended by the testator, unless the somewhat complicated construction is adopted that, as a second or third son is born, the earlier born sons would be divested *pro tanto* so as to give the last born an equal share with the others. This complicated construction is the one suggested by the respondent and adopted by this High Court in *Venkayamma* v. *Narasamma* (12). The principle that a contingent estate becomes converted into a vested estate as soon as the contingency happens is not a principle peculiar to English Law or to the Indian Succession Act (S. 107). In *Hickling* v. *Fair* (13) Lord Darvey says : "It is an elementary principle in the construction of the wills that a gift to a class after a life interest or life rent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the life-time of the life tenant or life renter. That principle is common to Scotland and England, and is applicable, I should suppose, wherever the English language is used." The Indian Legislature thought fit to extend it to Bengal Hindus. The better principle is to permit the vesting at the earliest possible moment consistent with the language of the testator, *i. e.*, immediately after the person named comes into being, unless there are express words postponing the vesting till after the termination of the preceding life estate. (*See* also Jarman on *Wills*, Vol. II, p. 1667, Halsburry, Vol. XXVIII, p. 716, S. 1339).

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11. (1817) 2 Mer. 363.
9. (1854) 1 Kay 638.
12. (1916) I L R 40 M 540 : 31 M L J 33.
13. (1899) A C 15 at 35.

Sivarama Aiyar v. Gopalakrishna Chettiar.

Ramesam, J.

I therefore agree with the respondent's contention that the will should be construed as giving a contingent remainder to the daughter's sons, such contingent remainder being converted into a vested remainder after the birth of the first daughter's son, subject to its diminution as the number of daughter's sons is augmented by further births.

The next question is—What is the effect of this disposition? As the law stood up to 1914, the disposition is void by the rule in the Tagore case, as no child was born during the testator's life-time. No estate vested in the child born in 1881 as he died immediately. He did not transmit any estate to his heirs.

Does the Madras Act I of 1914 (commonly known as Seshagiri Aiyar's Act) make any difference? In my opinion it does not.

The Act is not declaratory in the sense that it declares what the law always was. Still, it is certainly intended to be retrospective. The extent to which it can be used retrospectively is indicated in S. 2 (2) and in various decisions of this Court, *Venkayamma* v. *Narasamma* (12), *Muthuswami Iyer* v. *Kalyani Ammal* (14) and *Shunmuga Devar* v. *Shunmuga Devar* (15) and *Perianayagi Ammal* v. *Ratnavelu Mudaliar* (16) the Act has been used retrospectively. The actual decision in the cases does not help the respondent who wants the principle of these cases to be extended.

The argument on the Act centered on the meaning of the expression "come into operation." The appellant contends that it is synonymous with 'vest.' The respondent points out such a construction excludes cases obviously within the intention of the Act, *e. g.*, cases when a vested remainder becomes vested before the Act but the actual enjoyment is to begin after the Act. He also relies on the contrast between the words "come into operation" and "vested" in the clause (2). To this last argument, the appellant replies that the words "vest" and "operate" are used somewhat indiscriminately in the Act and refers us to the other sections. This is true; and yet I do not agree with the appellant's contention that the term of vesting is all that was intended. Nor am I able to agree with the respondent's contention that the words were intended to denote only the term of distribution. In my opinion, the words

12. (1916) I L R 40 M 540 : 31 M L J 33. 14. (1916) I L R 40 M 818.
15. (1919) 53 I C 203. 16. (1922) 18 L W 625.

Sivarama Aiyar v. Gopalakrishna Chettiar.

Ramesam, J.

"come into operation" are intended to include all cases of vesting after the Act though the testator died before the Act. [See *Shunmuga Devar* v. *Shunmuga Devar* (15) where Seshagiri Aiyar, J. uses the words 'final vesting' a case of transfer.] But, in cases where the vesting may happen before the Act on a proper construction of the will, the Act will further help the devisee named if he survives until after the termination of the preceding estate, so as to be able to take actual possession of the property. But for the application of the second principle, he himself must survive. An analysis of the possible cases may serve to clear my view on the application of the Act.

(1) The Act applies to all wills made after it and to all wills made before it, when the testators die after it. This is an obvious case.

(2) When the testator dies before the Act.

(*a*) If the vesting is *after the Act* and the legatee lives up to the termination of the preceding estate the Act applies. This also is an obvious case.

(*b*) If the vesting is *after the Act* the Act will apply even though the legatee died before the termination of the preceding estate *e. g.*, a testator died in 1877 giving a life estate to his daughter and remainder to his daughter's sons. A son is born in 1915 but dies before the daughter who lives up to 1918. The remainder becomes vested in the son at his birth and when he dies, it goes to his heirs. (*Perianayagi Ammal* v. *Ratnavelu Mudaliar* (16) is an example.) (*Muthuswami Iyer* v. *Kalyani Ammal* (14) is an example of a declaratory suit before the death of the life tenant).

(*c*) If the vesting is *before the Act,* still the Act will apply if the devisee survives until after the termination of the preceding estate. *E. g.* In the last illustration, if a son was born in 1881 and survives his mother, he takes the estate. This case will be excluded from the operation of the Act if the appellant's contention is accepted. The further transmission of the estate to the devisee's heir is an obvious result.

(*d*) I would even concede a further case. If the vesting is *before the Act,* and the devisee lives until after the Act, but may not or does not live until the termination of the

15. (1919) 53 I C 203.

16. (1922) 18 L W 625.

14. (1916) I L R 40 M 818.

Sivarama Aiyar v. Gopalakrishna Chettiar.

Ramesam, J.

preceding estate, the Act will apply to him and he will transmit the vested estate to his heirs.

In this case, the proper construction of the will involves a vesting before the Act. The disposition is void by reason of the Tagore case ; still, if the devisee lives beyond 1914, the void vesting will be converted into a valid vesting by reason of the Act. The estate having vested, descends to the heirs of the devisee. *Muthuswami Iyer* v. *Kalyani Ammal* (14) is an example.

(*e*) This is the last case that can happen and it is the present case. When the vesting was before the Act and the devisee does not live up to the termination of the preceding estate nor even up to beyond the date of the passing of the Act so as to give an opportunity for the Act to operate upon his *contingent and void* estate and convert into a *vested and valid* estate, the Act does not apply. In such a case the devisee took no estate and transmitted no estate—a result which is a bare statement of actual facts and does not involve any legal subtlety. To hold the opposite and to say that the Act applies to this case also is to say that an estate which never vested and which therefore never existed (not even as a contingent estate —being *void*) descended by inheritance to the heir of the person who was intended to have it but never had it—a fiction for which there is no warrant in the language of the Act and to give effect to which would be unparalleled in the annals of legislation. Mr. Krishnaswami Iyer points out to the fact that, in Cases (*a*), (*b*) and (*d*) (when the vesting happens at a time different from the falling into possession), the estate will be transmitted to the heirs of the devisee. This is true but this is not because of the Act but because the interest of the devisee was vested in him before his death. What interests descend by inheritance is a matter depending on general principles of law. The Act has nothing to do with it. All that it does is, it validates certain dispositions which, but for it, would be void. But one has to stop its application when the application sought is not the mere validation of a disposition but involves the transmission by inheritance of an interest which never existed up to the time of the succession. Mr. Krishnaswami Iyer argues that the effect of S. 2 (2) is, as if the Act existed prior to 1881, if not before 1877. I cannot accept this construction of the Act, as it involves, in my opinion, fictitious devolution.

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14. (1916) I L R 40 M 818.

Sivarama Aiyar v Gopalakrishna Chettiar, Ramesam, J

Mr. Krishnaswami Iyer refers to Jarman, Vol. II, p. 1353, to show that contingent remainders may descend. According to the passage cited, they descend only when the contingency is a collateral event not relating to the devisee; but the principle is inapplicable when the contingency is the passing of an Act validating the disposition and the devisee surviving, at least, after the passing of the Act. The real answer to the argument is that, there is not even a contingent interest, for contingent interest means a valid contingent interest not a void contingent interest.

I therefore differ from the Subordinate Judge on the application of Act I of 1914, allow the appeal and decree the plaintiffs' suit. In appeal, the 2nd defendant will pay their costs. In the Court below, both the defendants will be liable for (his) their costs. The 1st defendant will be liable for the mesne profits from 17th August, 1918, up to the date of the suit and for the mesne profits subsequent to suit. The Court below will ascertain the mesne profits up to the date of the suit and then pass a final decree. The mesne profits subsequent to suit will be determined in execution. The Subordinate Court of Kumbakonam will take up the point reserved and pass the final decree.

The Memorandum of Objections by 1st defendant is dismissed with costs.

Jackson, J.

Jackson, J. :—I have had the advantage of reading my learned brother's judgment, and have arrived at the same conclusion though by a different route. Two circumstances lead me to interpret the will, Ex. A., as making the male born to the testator's daughter heir to the real property given to his wife and daughter after their death and without any intention that the property should vest in him at birth and come to him by survivorship. In the first place the testator having deliberately chosen to write his will in English may I think he presumed to have intended that the words employed should bear their commonly accepted connotation. In the second place, it will be found that the will originally ran, " If my daughter does not beget male issue in her lifetime half the land and the house given to my wife and daughter by this will shall after their lives go to my brother and his male heirs. My earring, etc. " This left it to be presumed what should happen if his daughter did have male issue, and no doubt the testator on reading over his will saw that it should not be a mere matter

Sivarama Aiyar v. Gopalakrishna Chettiar.

Jackson, J.

of presumption. So he inserted in smaller script, " If a male is born to my daughter it will inherit the real property given to my wife and daughter, " which I take to mean ' the property shall after their lives go to her male issue ' merely expanding the previous sentence ; whereas if he had intended that property should vest in her male issue from birth, the testator would have made it clear in a separate clause.

If, however, the alternative and, of course, perfectly reasonable construction is adapted, so that the property vested in the male issue from the moment of birth, it remains to be considered how far this will can be validated by the retrospective effect of Act I of 1914. The will is dated 1876. The testator died in 1877. A son was born to the daughter in 1881. The testator's widow died in 1903 ; his daughter in 1918. Therefore the will was executed before Act I of 1914 ; but the provisions of the Act apply to such of the dispositions made in it as were intended to come into operation at a time subsequent to the passing of the Act. [S. 2 (2), Act I of 1914]. It is argued for the appellants that " dispositions " can refer only to the vesting under the will, and inasmuch as the vesting on the birth of the son in 1881 was null and void, there is no disposition to be considered which can be said to have been intended to come into operation after 1914. For the respondents on the other hand it is argued that " dispositions " include distribution, and the provisions of the Act apply to the distribution, in 1918, on the death of the daughter. It is further argued that inasmuch as the Act applies to this disposition it must be held to apply to every disposition in the will; in other words the will must be read in the light of Act I of 1914 from the date of its execution, because one of its dispositions has come into operation after the passing of that Act. I find nothing in the language of section 2 to give it this comprehensive character, and am sure that if that had been the intention of the legislature it both could and would have expressed it in plainer terms.

I agree, however, that disposition which is a word of most general import includes distribution, and what we have to consider is the effect of the Act on each disposition as that disposition come into operation. The ' vesting ' should have come into operation in 1881 when the son was born, but obviously the Act could have no bearing at this date, and this disposition was void. The next disposition is the death of the widow in 1903

Sivarama Aiyar v. Gopalakrishna Chettiar.

Jackson, J.

with which the Act has nothing to do. Then in 1918 the daughter dies and under the will as now interpreted if there is a son vested with the estate he as survivor succeeds to its enjoyment. But there is no such son, and therefore at this point of time there is no one to inherit under the will. I do not think the death of the son soon after his birth in 1881 and at any rate before 1914 affects the question. Under the will a male already vested with the estate must succeed the last life-holder. The son was certainly not vested in 1881 for that disposition was not intended to come into operation and obviously did not come into operation after 1914 and is therefore void. When then was he vested (supposing him to have survived)? Not in 1914. The Act itself cannot be regarded as a disposition vesting all the heirs who had failed to become vested previously owing to the Tagore case. And not, in my opinion, in 1918. The death of the mother could not vest the estate in her son. Of course he must inherit in the ordinary sense of the term but that brings us back to the alternative construction of the will. If the will is to be construed as allowing the male already vested to take the property as survivor on the decease of the life-holder, one can only say that no male was so vested in 1918. Because that disposition of the will *i. e.*, the vesting on the date of birth, had become operative before the passing of the Act and therefore entirley null and void. There was no other vesting disposition which could or did occur. The only other disposition to come into operation was the distribution, and when that occurred there was no one with a vested title who could succeed. Of course the accident of the son's death simplifies the problem, but I agree with Mr. Varadachariar that the solution would be the same if he survived. Of course it might be an extremely hard case if he did survive: but no hardship would arise in the present case if on my construction the will was taken as giving him the succession by right of inheritance in the ordinary English sense.

A. S. V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

Syed Oomer Sahib *Petitioner* (Respondent—Plaintiff)*

v.

Gopaul and others *(Applicant—Defendant).*

F. B.

Syed Oomer Sahib v. Gopaul.

Madras City Tenants' Protection Act III of 1922, S. 9—Applicability—Tenant against whom decree in ejectment had been obtained but who had not been actually ejected in execution at date of Act—Right to apply for sale of.

S. 9 of Madras Act III of 1922 applies to a case where the suit in ejectment has resulted in judgment but has not been executed or completed by the process of ejectment.

The tenant intended by the section is a person who is threatened with ejectment as the result of legal proceedings instituted against him but has not in pursuance of those proceedings been actually ejected. It is immaterial whether or not the proceedings resulted in a decree which might lead, but has not led, to an actual ejectment of the tenant.

Petitions under S. 115 of Act V of 1908, praying the High Court to revise the orders of the Court of Small Causes, Madras, in M. P. No. 170 of 1922 in Ejectment Suits Nos. 125 to 128 of 1921, respectively.

K. V Sesha Aiyangar for petitioner.

T L. Venkatrama Aiyar for respondent.

Jackson, J.

The Court (Jackson, J.) made the following Order of Reference to the Honourable the Chief Justice for Reference to a Full Bench :—

Defendant in Ejectment Suit No. 125 of 1921, Court of Small Causes, Madras, applied under S. 9 of the Madras City Tenants' Protection Act III of 1922 for an order directing plaintiff to sell the land in the suit. The Lower Court ordered accordingly and plaintiff seeks to revise its order.

The point for determination is whether at the date when the Act came into force defendant could be described in the words of S. 9, as " a tenant against whom a suit in ejectment has been instituted." He was undoubtedly a tenant and plaintiff had instituted an ejectment suit against him in 1921. In November, 1921 an order was made by consent by which the

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*C R P Nos. 21 and 147 to 149 of 1923. 7th April, 1924.

F. B

Syed Oomer Sahib v. Gopaul.

Jackson, J.

defendant was to vacate by January, 1922, but the order remained unexecuted when the Act came into force. Plaintiff contends that this order terminated the suit so far as S. 9 is concerned, and defendant maintains that it did not. I think that the plain reading of the section clearly supports the defendant. He is a tenant against whom a suit has been instituted, and whether that suit has been decreed or not, it can still be described as instituted. The second portion of the sentence in S. 9 may make this still clearer " against whom a suit has been instituted or proceeding under S. 41, Presidency Small Cause Courts' Act, 1882, taken." If a landlord has applied under S. 41, and the Court has proceeded to grant an order to a bailiff, the tenant is none the less one against whom the landlord has taken proceedings under S. 41. He is not one against whom the landlord has not taken proceedings, because there happens to be a bailiff's order ; nor is the tenant one against whom a suit has not been instituted because there happens to be a decree. A decree as defined in S. 2 (2), Civil Procedure Code, conclusively determines the rights of the parties with regard to all matters in controversy in the suit. But such conclusive determination is not opposed to the ordinary sense of the word " institute." " Institute " means (Oxford Concise Dictionary) establish, found, set on foot ; the original Latin meaning being " set up," and of course an institution is essentially something that has been established. No doubt in the Civil Procedure Code (Order IV, rule 1) " institute " is treated as synonymous with " commence " but it has never to my knowledge been used as entirely excluding the idea of completion. One cannot say that " instituted " essentially means " begun but not completed." S. 9 really provides that any tenant whose ejectment was contemplated, but who was not ejected at the time when the Act came into force, can enjoy its benefit. Apart from the language, there would be no sense in discriminating between suits in which decrees had and suits in which decrees had not been passed. The important point was whether the tenant had or had not been ejected.

The petitioner seeks to fortify this finding by arguments based on the other portions of S. 9, but I am not sure that they have much weight. There is a provision that the tenant may apply to the Court 15 days after the service on him of summons, and this, it is argued, must refer to suits pending at the time of the Act coming into force. But if the section had no

F. B.

Syed Oomer Sahib v. Gopaul.

Jackson, J.

retrospective effect at all, and only referred to suits filed after the Act, there would necessarily be summons, and this passage may well be confined to such summonses.

So too in regard to sub-clause (3) " any decree that may have been passed but which has not been executed, shall be vacated." This again could apply to suits filed after the passing of the Act. A tenant who is defendant in such a suit may have applied under sub-clause (1) have made default and had his application dismissed under sub-clause (2), may then have had the suit decreed against him, may have had his default excused, may have paid the price under sub-clause (3) and the decree which was passed but held in abeyance shall then be vacated. Therefore, I do not think that the mention of " decree " in sub-clause (3) necessarily implies that suits decreed, but not executed are referred to in sub-clause (1); but since I find on other grounds that such suits are undoubtedly within the terms of sub-clause (1) probably the decrees in such suits are those which were mainly in view when sub-clause (3) was drafted.

Accordingly I should find no difficulty in supporting the judgment now sought to be revised only my attention has been called to the ruling in *Latifa Bi* v. *Mattai Ammal* (1). The general frame of the Act including S. 10, makes it clear that S. 9 was not intended to enable tenants to apply for sale of the land to them under this section after the ejectment suit to which they were parties, had been decreed."

S. 10 lays down that in cases of compensation for tenants' buildings and trees (Ss. 4, 5) and in cases of fixing a reasonable rent (Ss. 6, 8) if at the time of the Act coming into force, suits in regard to such matters are pending or, are decreed but are awaiting execution the Act may nevertheless be applied.

There is no mention of S. 9, and therefore it has been held that the Act was intended to apply retrospectively only to such cases as are described in S. 10. But if S. 10 were intended to be a general clause covering every case, the cases contemplated in S. 9 even as interpreted in this ruling would certainly be mentioned under the first alternative in S. 10 " which are pending." The section would run " Ss. 4, 5, 6, 8 and 9 shall apply to suits which are pending and in which decrees have not been passed, and Ss. 4, 5, 6 and 8 to suits which are

1. (1922) I L R 46 M 836 44 M L J 271.

F. B.

Syed Oomar Sahib v. Gopaul.

Jackson, J.

pending and in which decrees have been passed but not executed." The more probable explanation seems to be that S. 9 is a code in itself ; and is not in any way affected by S. 10. I should have hesitated to put forward this view in face of the clear ruling in *Latifa Bi* v. *Mattai Ammal* (1), but I see that this has been held by Schwabe, C. J., in a case hitherto unreported—C. C. C. A. Nos. 51—57 of 1921, 17th December, 1923*.

In these circumstances, I refer the case to the Honourable the Chief Justice for reference to a Full Bench.

The point for reference is whether a tenant against whom a decree has been passed but not executed is a tenant entitled to apply for sale under S. 9, Madras City Tenants' Protection Act III of 1922.

K. V Sesha Aiyangar for the petitioner (landlord) S. 9 of the Act ought not to be construed so as to give it a retrospective operation. The use of the term " has been instituted " indicates that the proceedings must be pending and that it was intended to exclude suits which had ended in a decree before the Act. The phrase " has been " may be used to refer to a hypothetical state of affairs at a future time. *In re Athlumney* (2). Even if the words are ambiguous a prospective construction ought to be preferred *In re Athlumney* (2) and *Young* v. *Hughes* (3). With respect to the analogous right of compensation under S. 4, the Act distinguished between pending cases and cases which have proceeded to decree before the Act. S. 10 of the Act makes specific and separate provision for the awarding of compensation in each of these cases, and provides a machinery for its enforcement. It could not have been the intention of the Act to impose, on the landlords by implication such an onerous liability as compulsory purchase. A retrospective interpretation of S. 9 will violate the rule of consistent construction. *Colquhoun* v. *Brookes* (4) and *Garbutt* v. *Durham Joint Committee* (5). The decision in *Latifa Bi* v. *Mottai Ammal* (1) is based upon on the inexplicability of cl. 3 relating to vacation of decrees on the basis of a prospective construction. That is not correct. Because even with respect to the suits instituted after the Act, there may be delay in paying the purchase money whereupon the suit

1. (1923) I L R 46 M 836 : 44 M L J 271.
2. (1898) 2 Q B 547 at 551.
3. 4 H & N 76 at 83 and 84.
4. (1889) 14 A C 493 at 506.
5. (1904) 1 K B 522: (1904) 2 K B 514, 521, 522

*See *Kanniappa Chettiar* v. *Ramachandra Aiyar* since reported in 46 M L J 407.

F. B.
Syed Oomer Sahib v. Gopaul

will proceed to decree and when the delay is subsequently excused the decree will have to be vacated.

T. L. Venkatrama Aiyar for respondent was not called on.

The Court expressed the following

Coutts Trotter, C. J.

OPINION :—*The Chief Justice.*—In this case (C. R. P. No. 21 of 1923) the defendant in Ejectment Suit No. 125 of 1921 in the Small Cause Court applied under S. 9 of the Madras Act III of 1922 for an order directing the plaintiff to sell the land in the suit. The sole question is whether at the time the Act came into force the defendant can be described as " a tenant against whom a suit in ejectment has been instituted." It is not contended that those words can bear the extreme meaning that any tenant against whom a suit in ejectment had ever been instituted—a suit which might have been brought to a completion by execution and ejectment—is within these words of S. 9 ; but it is contended that it applies to a case where the suit in ejectment has resulted in judgment but has not been executed or completed by the process of ejectment. It seems to me that that contention is right and that the tenant intended by the section is a person who is threatened with ejectment as the result of legal proceedings instituted against him but has not in pursuance of those proceedings been actually ejected. It seems to me immaterial whether or not the proceedings resulted in a decree which might, lead, but has not, led to an actual ejectment of the tenant. This is in accordance with the view expressed by the late Chief Justice and my brother Wallace in *Kanniappa Chettiar* v. *Ramachandra Aiyar** and I agree with them in thinking that the case in *Latifa Bi* v. *Mattai Ammal* (1) was wrongly decided. The answer to the reference will therefore be in the affirmative.

Ramesam, J. :—I agree.

Wallace, J. :—I agree.

A. S. V. *Reference answered in the affirmative.*

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* (1922) 46 M L J 407. 1. (1922) I L R 46 M 836 : 44 M L J 271.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

Ediga Thimmiah and others *Petitioners* (Accused in C. C. No. 24 of 1923 on the file of the Sheristadar, 3rd class Magistrate of Madakasira).*

Criminal Procedure Code—S. 423 (d)—Appellate Court—Court-fees of complainant—Order directing payment of, by accused—Validity—Order if an enhancement of sentence—Court-fees Act, S. 31.

Ediga Thimmiah *In re.*

An order to collect Court-fees from the accused passed by an appellate Court is not an enhancement of the sentence. The making of an order under S. 31 of the Court-fees Act does not ordinarily amount to an enhancement of sentence but may be made as an incidental order to bring the judgment into conformity with the law. S. 31 does not make fees ordered to be repaid under the section part of the sentence.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Penukonda in Criminal Appeal No. 26 of 1923 preferred against the judgment of the Court of the Sheristadar, 3rd class Magistrate of Madakasira in C. C. No. 24 of 1923.

D. Audinarayaniah for *V S. Narasimhachari* for petitioners.

The Public Prosecutor (J. C. Adam) on behalf of the Crown.

The Court made the following

ORDER :—This Criminal Revision Case has been admitted on the question of the validity of the appellate Court's order to pay the complainant's Court-fees under S. 31 of the Court-fees Act.

At the hearing an objection has been raised that the appellate Court's judgment is defective under S. 367 of the Code of Criminal Procedure because the Joint Magistrate did not discuss the bearing of the evidence of each prosecution witness on the guilt of each accused. This is not one of the

*Cr. R. C. No. 890 of 1923. 10th April, 1924.

(Cr. R. P. No. 711 of 1923.)

Ediga Thimmiah In re

grounds stated in the revision petition and I do not find any substance in it.

The order to collect Court-fees from the accused passed by the appellate Court is not an enhancement of the sentence under the authority of *Vemuri Seshanna* (1). The case in *Queen-Empress* v. *Thangavelu Chetti* (2) was decided by a single Judge in September, 1898. The headnote to the report indicates that it was a decision under the Code of 1882 which had not the same provision under S. 423 (*d*) for passing incidental or consequential orders in appeal that was introduced by Act V of 1898. I hold that the making of an order under S. 31 of the Court-fees Act does not ordinarily amount to an enhancement of sentence but may be made as an incidental order to bring the judgment into conformity with the law. S. 31 of the Court-fees Act provides that all fees ordered to be repaid under this section shall be recoverable " as if they were fines," but does not thereby make them part of the sentence. In *Queen-Empress* v. *Thangavelu Chetti* (2) the Assistant Magistrate who tried the case made an order for a part of the Court-fees claimed by the complainant to be repaid out of the fine collected as sentence and it was for this reason that Justice Moore was impelled to treat the Assistant Magistrate's order to pay the fee as an integral part of the sentence, and to regard the Deputy Magistrate's order to pay an increased amount as an enhancement of the sentence. I do not find any such objection to exist in the present case to the Joint Magistrate's order.

The Criminal Revision Petition is therefore dismissed.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

A. Janoo Hassan Sait by his authorised agent Dada Beg Mahomed *Appellant** (*Plaintiff*)

v.

M. S. N. Mahamad Ohuthu .*Respondent* (*1st defendant*)

Janoo Hassan Sait v. Mahamad Ohuthu

Foreign Court—Submission to jurisdiction of—What amounts to—Power-of-attorney empowering agent to represent principal in litigations in that Court—

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1. (1902) I L R 26 M 421. 2. (1898) I L R 22 M 153.

*S. A. No. 1146 of 1921. 16th April, 1924.

Execution of—Effect—Foreign judgment obtained on merits—Judgment delivered ex parte *if and when a—Notice of suit to defendant—Irregularity in service of, not a ground for attacking decree—Decision of foreign Court as to sufficiency of service—Correctness of—Presumption.*

Jaiioo Hassan Sait v. Mahamad Ohuthu.

The first defendant and his brother, who were trading in partnership in Ceylon, executed a power-of-attorney to *R* empowering him to represent the principals in litigations either as plaintiff or as defendant. Under the provisions of that power *R* appointed *G* as his sub-agent during his absence from Ceylon. A suit was filed on promissory-notes against the first defendant, and notice thereof was served on *G* as first defendant's agent. No appearance at all was put in on behalf of the first defendant, the case was allowed to proceed *ex parte*, and the suit was decreed.

In a suit brought in British India against first defendant upon the judgment of the Ceylon Court, *held*, (1) that the first defendant must, by reason of his having executed the power-of-attorney in favour of *R*, be deemed to have submitted to the jurisdiction of the Ceylon Court; (2) that the judgment sued upon, though delivered *ex parte*, was one obtained on the merits; (3) that the decision of the Ceylon Court that the notice of the suit to the first defendant was sufficient must be taken to be correct in the absence of any evidence to the contrary; and (4) that, if there was any irregularity in the service of the notice, that point could not be raised in British Indian Courts as a ground for questioning the validity of the foreign judgment.

Second Appeal against the decree of the District Court of Tanjore in A. S. No. 579 of 1920, dated 21st March, 1921, preferred against the decree of the Court of the Second Additional Subordinate Judge of Tanjore in O. S. No. 9 of 1919 (O. S. No. 25 of 1918 on the file of the Court of the Subordinate Judge, Tanjore).

B. Sitarama Rao and *K. Sundara Rao* for appellant.

T L. Venkatrama Iyer for respondent.

The Court delivered the following

JUDGMENTS:—*Phillips, J.*:—This is a suit upon a foreign judgment of the Colombo Court against the 1st defendant. The 1st defendant and his brother who were trading in partnership executed a power-of-attorney to one Sheikh Abdul Rahiman under which he was empowered to sue in the Courts of Ceylon and to appear before any Court or Courts of Justice either as plaintiff or defendant, etc. The power is a very wide one and gives the agent very full powers to represent the principals. Under the provisions of that power Abdul Rahiman appointed one Abdul Guddus as his sub-agent during his absence from Ceylon. A suit was filed in 1915 on four promissory notes against Abdul Rahiman and Abdul Guddus, but upon their

Phillips, J.

Janoo Hassan Sait v. Mahamad Obuthu.

Phill'ps, J.

pleading that they were merely agents of 1st defendant's firm another suit was brought against the 1st defendant. Notice of the suit was served on Abdul Guddus as 1st defendant's agent and the judgment on which the present suit is based was passed in his absence.

The first question for consideration is whether the 1st defendant had submitted to the jurisdiction of the foreign Court, and on this point I must agree with the learned District Judge that he did so by executing the power of attorney in favour of Abdul Rahiman empowering the latter to conduct litigation in the Ceylon Courts, namely in a place where the agent was conducting business for his principals, and it is clearly a contract binding him to appear in those Courts and amounts to submission to the jurisdiction of those Courts. In this connection I would refer to the case reported in *Ramanathan Chettiar* v. *Kalimuthu Pillai* (1).

The next question raised for the respondent is that the foreign judgment sued on was not one obtained on the merits. Ordinarily, a judgment delivered *ex parte* is deemed to be one on the merits ; but it is contended here that in summary suits similar to those provided for by O. 37 of the Civil Procedure Code an *ex parte* judgment cannot be deemed to be one passed on the merits. Reliance is placed on the case reported in *Viswanadha Reddi* v. *Keymer* (2) the decision in which was confirmed by the Privy Council in *Keymer* v. *Viswanatham Reddi* (3). In that case a defence had been put in, but it was ordered to be struck out because of defendant's failure to answer interrogatories. The decision given in these circumstances was held to be one not on the merits. There are no doubt some observations in the judgment of this Court which would go to show that a foreign judgment passed in default of appearance is not a decree on the merits, and two cases are therein referred to as supporting this proposition. One of these is *The Delta* (4) and the other is *The Challenge and Due D'Aumale* (5). In the first of these cases the foreign judgments had not been delivered when the suit was filed in England and also it was held that the evidence of the French and Italian Advocates

1. (1912) I L R 37 M 163 24 M L J 619.
2. (1914) I L R 39 M 95 27 M L J 670.
3. (1916) I L R 40 M 112 32 M L J 35 (P C).
4. (1876) 1 Prob. Div. 393. 5. (1904) Prob. Div. 41.

Janoo Hassan Sait v. Mahamad Ohuthu

Phillips, J.

examined left it doubtful whether the foreign judgment in that case would have, even in France or Italy, the force of *res judicata*. In the second case it appears that the defendants had not submitted to jurisdiction. In the judgment of the Privy Council which is reported in *Keymer* v. *Viswanatham Reddi* (3) their Lordships in referring to the question under S. 13 (*b*), Civil Procedure Code, state that that section refers to " those cases where for one reason or another the controversy raised in the action has not in fact been the subject of direct adjudication by the Court. " From this it would appear that it is necessary in the first place that some controversy should be raised in the action and in the second place that after it has been raised it should not have been finally decided. This principle is the same as that enunciated by Lord Herschell in *Noviou* v. *Freeman* (6) " In a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, how ever much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal. " It will be seen that in accordance with this principle, *ex parte* decrees are by no means necessarily decrees not passed upon the merits. It is only when a defence has been raised and for some reason or another has not been adjudicated upon that the decision can be said to be not upon the merits. In other instances of *ex parte* decrees, they must be deemed to be decrees passed upon the merits. In the present case no appearance at all was put in on behalf of the first defendant and the case was allowed to proceed *ex parte* and consequently it must be deemed to have been passed upon the merits.

A further question is raised, namely, that the first defendant had no notice at all of the suit and that consequently the whole decree is a nullity as coming under S. 13 (*d*), namely. " where the proceedings in which the judgment was obtained are opposed to natural justice. " A good deal of argument has been addressed to the question as to whether at the time that the notice was served upon him Abdul Guddus was the agent of the first defendant. It appears that he was appointed

3. (1916) I L R 40 M 112 : 32 M L J 35 (P C).
6. (1889) 15 A C 1.

Janoo Hassan Sait v Mahamad Ohuthu.

Phillips J.

as first defendant's agent and had acted as such and there is no evidence to show that the agency had ceased at the time when the notice was served upon him. The foreign Court held that the notice was sufficient, and that decision must be taken to be correct in the absence of any evidence to the contrary. If there was any irregularity in the service of the notice, that point cannot be raised in the Courts of this country as a ground for questioning the validity of the foreign decree, as was held in *Pemberton* v. *Hughes* (7) where it was remarked by Lindley, M. R., at page 790 "If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice." If first defendant had definitely proved that Abdul Guddus was in no sense his agent at the time of the service of the notice and that consequently he was totally unaware of the proceedings in the Colombo Court, this might be an answer to the validity of the judgment ; but this has not been shown and consequently I must hold that the judgment is valid.

In this view, I think it is unnecessary to discuss the further questions raised as to whether the death of first defendant's brother terminated Abdul Rahiman's agency and consequently the sub-agency of Abdul Guddus. They were at one time admittedly first defendant's agents and it is not shown that they had ceased to be so at the time the notice was served on the latter.

The appeal is accordingly allowed and the decree of the Court of first instance restored with costs both here and in the lower appellate Court.

Madhavan Nair, J. :—I agree.

A. S. V. *Appeal allowed.*

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7. (1899) 1 Chan. 781.

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD SHAW, LORD BLANESBURGH AND SIR JOHN EDGE.

R. Vaidyanatha Aiyar and another (*Defendants*) *Applts.*

v.

K. Swaminatha Aiyar and another (*Plaintiffs*) *Respdts.*

P. C.

Vaidyanatha Aiyar *v.* Swaminatha Aiyar.

Civil Procedure Code, S. 92—Suit under—Maintainability—Plaintiffs having no interest in trust—Advocate-General's sanction to institution of suit—Effect.

The consent in writing of the Advocate-General to the institution of a suit will not bring the suit within the meaning of S. 92 of Civil Procedure Code of 1908 unless the plaintiffs have an interest in the trust in respect of which the suit is instituted.

Civil Procedure Code of 1908, S. 92—Trust—Interest in—Persons having—Chatram public—Founder's descendants in female line—If have "interest" in chatram—Descendants themselves never resorting to chatram—Effect.

Descendants, although only in female lines of the founder of a chatram dedicated to the public with a trust created for public purposes of a charitable nature, have an interest in the proper administration of the trust sufficient to enable them to maintain a suit under S. 92, C. P. C., although they themselves may never find it necessary to use the chatram as a rest-house or to obtain food there.

Civil Procedure Code, S. 92—Temple public—Interest—Persons having—Persons resorting to temple—Bare possibility of a person desiring to resort to temple—Distinction.

Public Hindu temples are *prima facie* to be taken to be dedicated for the use of all Hindus resorting to them. To hold that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust will defeat the object with which the Legislature inserted those words in the section.

Civil Procedure Code of 1908, S. 92—Mosque—Interest direct in—Persons having—Regular worshippers in mosque.

Mahomedans who worship regularly in the mosque of a village have a direct interest in the trust relating to the mosque.

Civil Procedure Code, S. 92—"Persons having an interest in the trust"—Insertion of—Object of Legislature.

The object of the Legislature in inserting the words "persons having an interest in the trust" in S. 92 was to prevent people interfering by virtue of the section in the administration of charitable trusts merely in the interests of others and without any real interest of their own.

Reasons why the word "direct" which occurred in S. 539 of Civil Procedure Code of 1877 was omitted in subsequent Codes.

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*P C Appeal No. 63 of 1922. 19th June, 1924.

P. C.

Vaidyanatha Aiyar
v.
Swaminatha Aiyar.

Trust—Trustee—Appointment—Founder's descendants in male line—Last survivor of—Right of—Appointment by such survivor—Validity—Property of trust falsely alleged to belong to survivor as proprietor—Effect.

Semble the last survivor of the descendants in the male line of the founder of a chatram charity has a right to appoint a trustee of the charity. Where such last survivor appointed a manager of the charity properties falsely alleging them to belong to himself as proprietor, and did not purport to appoint him as a trustee of properties which were already trust properties, *held,* that the manager had not been properly appointed a trustee of the chatram.

Consolidated Appeal from one judgment and two decrees (13th November, 1919) of the High Court, which affirmed (with a variation) a judgment and two decrees, (the 15th April, 1918 and 30th September, 1918) of the Subordinate Judge of Kumbakonam.

The plaintiffs sued, under the provisions of section 92 of the Code of Civil Procedure, 1908, for the removal of the defendants from the trusteeship or administration of a certain public religious trust (known as " Kalyanarama Aiyar's Charities "), and for the framing of a scheme of management of the trust by the Court, and for the appointment of new trustees, etc.

The said Kalyanarama Aiyar constructed and endowed in or about 1856 a *Chatram* or *Choultry* in Kumbakonam as a rest-house for travellers, and for feeding of Brahmins and others, and it had ever since been a public religious trust. But he made no provision for the devolution of the management and the administration of the trust after his life-time. He had a large number of relations of his own, Suri Aiyar, one of them, was the last manager, and died in December, 1913. The defendants Nos. 1 and 2 took possession of the trust properties under the terms of a will alleged to have been executed on the 7th November, 1881 by the said Suri Aiyar in their favour.

The plaintiffs, who were members of the founder's family, with the permission of the Advocate-General, instituted the present action on the 13th November, 1916, alleging in their plaint that the defendants had no right whatever to remain in possession of the properties of the trust; and were not fit and proper persons to be trustees, and that they were guilty of breach of trust.

The defendants filed a written statement denying " that there was any dedication to the public of the *Chatram* as a rest-

house for travellers and for feeding Brahmins, etc.," and they relied upon the will of the late trustee, Suri Aiyar.

After examining the evidence, the Subordinate Judge (C. V. V. Sastri, Esq.) delivered judgment on the 15th April, 1918, in favour of the plaintiffs, and made a preliminary decree, directing the framing of a scheme for the due management of the trust, and on the 30th September, 1918, a final decree, approving of the scheme framed in consultation with the Advocate-General of Madras.

The defendants appealed from both decrees to the High Court of Judicature at Madras, which (Abdur Rahim and Burn, JJ.) delivered judgment on the 13th November, 1919, in substance confirming the judgment of the Trial Judge.

For a full report of the proceedings in the High Court see the case reported in *Vaithianatha Aiyar* v. *Tyagaraja Aiyar* (1).

W. H. Upjohn, K. C. and *Majid* for appellants.

L. de Gruyther, K. C. and *Narasimham* for respondents.

19th June, 1924. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE :—These are consolidated appeals by defendants in a suit, No. 1 of 1916, from two decrees, dated the 13th November, 1919, of the High Court at Madras, which affirmed with a trifling variation as to some property claimed, a preliminary decree, dated the 15th April, 1918, and a final decree, dated the 30th September, 1918, of the Subordinate Judge of Kumbakonam.

The suit relates to a *Chatram*, also called a choultry, at Kumbakonam, and property alleged to be endowed property of the chatram. The chatram is now known as Kalyanarama Aiyar's chatram. Formerly it was known as Rajappa Aiyar's chatram. Two Brahmins were the plaintiffs. Since the suit was in appeal in the High Court one of the plaintiffs died ; his legal representative is now on the record and is one of the respondents.

The plaintiffs on the 13th November, 1916, brought this suit and claimed a declaration that the chatram was a public charitable institution having the properties mentioned in

1. (1919) 41 M L J 20.

Schedule B of the plaint and seven-ninths of the properties mentioned in Schedules C to F as endowments ; a declaration that the defendants are not lawfully appointed trustees and are not entitled to any right to the management and administration of the institution or in the properties belonging to it ; that the defendants be removed from the office ; that fit and proper persons be appointed trustees for the administration of the trust and that the chatram and the properties belonging to it be vested in them ; that a scheme for the administration of the trust be settled ; and other reliefs. The case of the plaintiffs was that the chatram was a public chatram, which had been founded and dedicated to the public more than 60 years before suit as a charitable institution for the convenience of travellers as a halting place and for the feeding of poor Brahmins resorting to it. The plaintiffs had obtained under S. 92 of the Code of Civil Procedure, 1908, the consent in writing of the Advocate-General to their institution of the suit.

The defendants denied that the plaintiffs were persons who had an interest in the trust within the meaning of S. 92 of the Code of Civil Procedure, 1908. They alleged that the chatram was a private chatram, and they denied that it had ever been dedicated to the public, and that it had ever been endowed with any of the properties claimed as endowments ; they pleaded that they had been duly appointed trustees, and other matters which are immaterial if they had not been duly appointed as trustees.

The learned Subordinate Judge who tried the suit recorded oral and documentary evidence, and he found that the plaintiffs having obtained the consent in writing of the Advocate-General were persons who were entitled to institute the suit ; that the chatram had been dedicated to the public and had been endowed as alleged in the plaint ; that the defendants were not duly appointed trustees, and decided that a scheme for the management of the trust should be framed ; and he framed a scheme for the management of the trust. The learned Judges of the High Court on appeal concurred with the findings of the Subordinate Judge except that they found that a small portion of the property claimed as endowment was not endowed property and with that variation as to the endowed property affirmed by their decrees the decrees of the Subordinate Judge, and dismissed the appeals to their Court. From

those decrees of the High Court these consolidated appeals have been brought.

Mr. Upjohn, who appeared for the appellants, in his very able and exhaustive argument in support of these consolidated appeals, took and relied upon four points only. They were (1) that the plaintiffs were not persons who had an interest in the charitable trust within the meaning of S. 92 of the Code of Civil Procedure, 1908, and consequently had no *locus standi* to institute this suit ; (2) that the chatram was not proved to be a public trust ; (3) that the Courts below had misconstrued the will of Swaminatha Aiyar of the 7th November, 1881 ; and (4) that the first defendant had been properly appointed a trustee and there was no ground for removing him from his office as trustee of the charity. Their Lordships will deal with these points in the order in which they were argued by Mr. Upjohn.

Mr. Upjohn's first point was that assuming for the purpose only of his argument that the chatram had been dedicated to the public with a trust created for public purposes of a charitable nature, the suit would not lie if the plaintiffs had not within the meaning of S. 92 of the Code of Civil Procedure, 1908, an interest in the trust. That is a perfectly sound argument. The consent in writing of the Advocate-General to the institution of the suit by the plaintiffs would not bring the suit within the meaning of S. 92 of the Code of Civil Procedure, 1908, unless the plaintiffs had an interest in the trust. Mr. Upjohn contended that the plaintiffs had no interest in the trust within the meaning of S. 92. The question is had the plaintiffs an interest in the trust within the meaning of the section ? They were descendants in female lines of Rajappa Aiyar and his son Kalyanarama Aiyar, one of whom, probably the former, founded and dedicated to the public the chatram as a charitable institution, and are of the founder's kin. The chatram was at first known as Rajappa Aiyar's chatram and was subsequently known as Kalyanarama Aiyar's chatram.

On the 22nd August 1864 the five sons of Kalyanarama Aiyar executed a partition deed in which the chatram and the lands then belonging to it, from which the income of the chatram was derived, were mentioned. The lands belonging to the chatram were excepted from the partition, but it was agreed that the five brothers should manage the chatram lands according to the order of seniority. It is obvious that the chatram

P. C.

Vaidyanatha Aiyar v. Swaminatha Aiyar.

Sir John e.

must have been endowed with these lands before the date of that deed of partition. Mr. Upjohn contended that "an interest in the trust" to be within S. 92 of the Code of Civil Procedure, 1908, must be of some special interest and not merely a sentimental interest, and he referred to the dictum of Lord Eldon, L. C., in *Re the Master Governors and Trustees of the Bedford Charity* (2) in which in a reference to Sir Samuel Romilly's Act (52 Geo. 3, c. 101), which authorised persons other than the Law Officers to present petitions to the Court in certain matters of public charities, Lord Eldon said

> "The Act, indeed, authorises 'any two or more persons' to present a petition ; but I conceive that those words must be understood to mean persons having an interest."

which earlier at page 518 Lord Eldon interpreted as meaning "a direct interest in the charity".

Mr. Upjohn also referred to the observations of Lord Eldon, L. C., in *The Corporation of Ludlow, etc.* v. *Greenhouse and others* (3). It may be that the dictum of Lord Eldon in the *Bedford Charity Case* (2) caused those who were responsible for the drafting of S. 539 of the Code of Civil Procedure of 1877 (Act X of 1877) to draft that section as giving a right in cases of a breach of a trust created for public charitable purposes to "two or more persons having a direct interest in the trust," and who had obtained the consent of the Advocate-General, to institute a suit under that section. It must, however, have subsequently appeared to the Governor-General of India in Council that the limitation of a "direct" interest was not expedient in India, and it was enacted by S. 44 of the Civil Procedure (Amendment) Act, 1888, which amended the procedure then in force, "That in S. 539, for the words 'having a direct interest' the words 'having an interest' shall be substituted."

It may be that Coutts Trotter, J., was correct in stating, in *Ramachandra Aiyar* v. *Parameswaran Unni* (4), that it was in consequence of the decision in *Jan Ali* v. *Ram Náth Mundul* (5), that the change in the law was made by omitting the word "direct." In that case the High Court at Calcutta had held that the plaintiffs there, two Muhammadans who lived in

2. (1819) 2 Swanston's Chan. Reports, 518.

3. (1827) 1 Bligh's Reports, N. S. 17.

4. (1918) I L R 42 M 360 at 395 36 M L J 396. 5. (1882) I L R 8 C 32.

P. C.

Vaidyanatha Aiyar v. Swaminatha Aiyar.

Sir John Edge.

a village and worshipped regularly at the village mosque, had no direct interest in the mosque. Their Lordships would have considered that Muhammadans who worshipped regularly in the mosque of the village had a direct interest in the trust relating to the mosque. But so that they may not be misunderstood as to the meaning of 'interest' in S. 92 of the Code of Civil Procedure, 1908, they think it advisable to say that public "Hindu Temples are *prima facie* to be taken," as Sir John Wallis, C. J., said in *Ramachandra Aiyar* v. *Parameswaran Unni* (4) "to be dedicated for the use of all Hindus resorting to them." They agree with Sir John Wallis that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust appears to defeat the object with which the legislature inserted these words in the section. "That object was to prevent people interfering by virtue of the section (S. 92) in the administration of charitable trusts merely in the interests of others and without any real interest of their own." In the present case their Lordships are of opinion that the fact that the plaintiffs are descendants although only in female lines of the founder of the chatram gave them an interest in the proper administration of the trust sufficient to enable them to maintain this suit, although they themselves may never find it necessary to use the chatram as a rest-house or to obtain food there.

As to the second point argued by Mr. Upjohn it is sufficient to say that there are concurrent findings that the chatram was a public trust, and their Lordships may add they also find that the chatram is a public trust.

As to third point argued by Mr. Upjohn, that the Courts below misconstrued the will of Swaminatha Aiyar of the 7th November, 1881, that contention if well founded would show that the gift of some of the property to the chatram which each Court has found to belong to the chatram was a void gift within the decision of the Board in *Runchordas Vandrawandas* v. *Pavatibhai* (6). The testator was one of the five sons of Kalyanarama Aiyar. It is not necessary to set out the translation of the whole of his will; the contention turns on the meaning of part of the will.

After referring to the partition of 22nd August, 1894, between him and his brothers and some other matters, the testa-

4. (1918) I L R 42 M 360 at 368 : 36 M L J 396.
6. (1899) L R 26 I A 71.

P. C.
Vaidyanatha Aiyar v. Swaminatha Aiyar.
Sir John Edge.

tor's will as translated continues, so far as is material, as follows :—

"The arrangement which I make regarding the aforesaid properties is this :—After my decease my properties and my estate shall be managed with all rights by my divided brothers—K. Venkataranga Aiyar and K. Suryanarayana Aiyar as executors. The incomes from the villages and gardens shall be divided into three portions and two portions thereof shall be given to my wife, and the said house and the *Ethiradi manai* (manai in front of it) be given to her for her occupation; and with the remaining one portion, the debts due by me and the debts contracted by me and K. Venkataranga Aiyar on the security of our family properties shall be discharged. After the said two kinds of debts are discharged, the said executors shall with the said one-third portion of the said income make *annadhanam* (feed poor people) in our family choultry in Perumbandi now under the management of K. Venkataranga Aiyar. My wife shall take all the aforesaid moveable properties and enjoy them according to her pleasure, and if she dies leaving any moveable properties, they shall be used by the said executors themselves for the said feeding charity. After my wife's decease, two out of three portions of the income enjoyed by her shall be utilised for the charity and the remaining one out of the three shares, and the dwelling-house and *manai* in front, shall be taken by K. Venkataranga Aiyar and K. Suryanarayana Aiyar and their posterity. The other *dayadis* have no right whatever."

Their Lordships assume the words "the charity" in the translation are the correct rendering of the vernacular which they are informed is in Tamil. If those words are the correct rendering of the vernacular they plainly refer to the chatram charity which had immediately before been indicated and the gift was not void for uncertainty. The original will was before the learned Subordinate Judge who tried the suit and who understood Tamil. This is what he said as to that part of the will :—

"14. It is next contended that this gift of a 2|3rd share in the 2|3rd share to a *Dharmam* was invalid, and the decision in *Parthasarathi Pillai* v. *Thiruvengada Pillai* (7) was relied upon. A perusal of Swaminatha Aiyar's will indicates to my mind that the *Dharmam* he intended to create in respect of the 2|3rd share in the 2|3rd share was the *Dharmam* to which he gave a 1|3rd share in the income : and that the gift of 2|3rd share of a 2|3rd share is not void for uncertainty.

"15. It was lastly contended that it was not open to this Court to construe the terms of Swaminatha Aiyar's will, in so far as they relate to the charity but it appears to me that it is open to this Court to see what interest the charity has in Swaminatha Aiyar's properties. I therefore find that the chatram has a 7|9th share in the income from the C to F Schedule properties under Swaminatha Aiyar's will."

This is what the learned Judges of the High Court said on that subject :—

"As regards 2|3rd of the income of the properties given to the wife which the will directs to be utilised for *Dharmam* on her death, it is argued that

7. (1907) I L R 30 M 340 : 17 M L J 379.

P. C.

Vaidyanatha Aiyar v. Swaminatha Aiyar.

Sir John Edge.

the reference there is not to this choultry but to charity generally. The learned Subordinate Judge has held that the word '*Dharmam*' refers to this choultry and we think he is right in that construction. In that view of the will the choultry becomes entitled under Exhibit C to 7|9ths of the income of the properties."

Their Lordships hold that the will was not misunderstood by either of the Courts.

As to the fourth and last point argued by Mr. Upjohn that the first defendant, Vaidyanatha Aiyar, had been properly appointed a trustee of the chatram and ought not to have been removed, it is necessary to see what the appointment in fact was. His appointment was made by the 10th and 11th paragraphs of the will of Suri Aiyar, probate of which was granted on the 17th July, 1915. Suri Aiyar was the last survivor of the five brothers who were the sons of Kalyanarama Aiyar. The 10th and the 11th paragraphs of the will, as translated, were as follows :—

"10. The choultry mentioned in paragraph 3 aforesaid and the entire properties attached thereto shall be in the management of the aforementioned R. Vaidyanatha Aiyar. The Brahmin feeding and the Dwadasi Kattalai of the said choultry shall be conducted on a scale not inferior to what is being conducted now.

"11. After the abovementioned Vaidyanatha Aiyar, his younger brother the said R. Narayanaswami Aiyar and after him, my friend Jayakrishnachariar residing in Melakkaveri Achari Agraharam shall look after the management of the said choultry and of the entire properties attached thereto."

Turning to the 3rd paragraph of the will it will be seen what were the properties for the management of which Vaidyanatha Aiyar was appointed. That 3rd paragraph is, as translated, as follows :—

"3. Besides the abovesaid properties there are in Kumbakonam Town to the northern side of the Cauveri, my family choultry, the buildings attached thereto, lands, grounds, bandy pettai, etc., properties. These belong to me and are in my possession and enjoyment."

Suri Aiyar was appointing Vaidyanatha Aiyar manager of properties which he falsely alleged belonged to himself as proprietor, and was not appointing him as a trustee of properties which were already trust properties. Suri Aiyar as the last survivor of the descendants in the male line of the founder of the chatram possibly had a right to appoint a trustee of the charity. See *Boidyo Gauranga Sahu* v. *Suderi Mata* (8). But that was not what he was professing to do.

8. (1916) I L R 40 M 612 32 M L J 597.

P. C.

Vaidyanatha Aiyar v. Swaminatha Aiyar.

Sir John Edge.

He was professing to appoint a manager of property which he falsely alleged to be his own private property, and in the opinion of the Subordinate Judge his object was to afford a monthly income for the daughter of his late concubine and her children.

After Mr. Upjohn had concluded his arguments in support of the appeals his junior counsel addressed the Board on a subject which Mr. Upjohn had not referred to and contended that some small portions of the properties did not belong to the trust, but they had been concurrently dealt with in the decrees of the trial Judge and the High Court as the properties of the charitable trust, and the attention of their Lordships was not directed to any evidence sufficient to justify the contention.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitor for appellants *Douglas Grant.*

Solicitor for respondent No. 2 : *H. S. L. Polak.*

A. de M. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Ruckmani Ammal *Petitioner* (Petitioner)*

v.

Veerasami Aiyangar and another .*Respondents (Defendant and 2nd plaintiff in O. S. No.* 420 *of* 1919 *and plaintiff and 2nd defendant in O. S. No.* 396 *of* 1920).

Ruckmani Ammal v Veerasami Aiyangar.

Civil Procedure Code, Ss. 2 (2), 115, *O.* 32, *Rr.* 2 *and* 3—*Minor applying to be impleaded as legal representative—Application without next friend—Dismissal—Impleading legal representative without notice to another claimant—Rival claims not adjudicated on—Orders if revisable—Right of appeal—Order if amounts to decree.*

Where on the death of the plaintiff in a suit, his minor widow applied to be brought on record as legal representative without being represented by a next friend and the Court rejected the application on the analogy of O. 32, R. 2, it cannot be held to have acted irregularly in the exercise of its jurisdiction.

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*C R P Nos. 400, 401, 402 and 403 of 1923. 24th March, 1924.

Ruckmani Ammal *v.* Veerasami Aiyangar.

On the death of a party, two persons applied to be impleaded as legal representatives. The Court dismissed the application of one on the ground she was a minor and was not represented by a next friend and allowed the other petition without determining the question of rival claims on the merits and without notice to the minor claimant. *Held,* the mere fact of being a minor is no ground for not considering the claim of the minor, and the order is revisable under S. 115, there being no right of appeal against the same.

Where both the claimants are not parties to the suit, an order rejecting the application of one of them is not a decree and is not appealable. *Ayya Mudali Velan* v. *Veerayee,* (1920) I L R 43 M 812 : 39 M L J 218, distinguished ; *Lakshmi Achi* v. *Subbarama Aiyar,* (1915) I L R 39 M 488 at 493 : 28 M L J 491 followed.

Petition under Ss. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order, dated 26th October, 1922, of the Court of the District Munsif of Srirangam in I. A. No. 544 of 1922 and No. 568 of 1922 in O. S. No. 420 of 1919 and I. A. Nos. 569 of 1922 and 545 of 1922 in O. S. No. 396 of 1920 respectively.

T V Muthukrishna Aiyar for petitioner.

L. A. Govindaraghava Aiyar and *Watrap S. Subramania Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—In O. S. No. 420 of 1919 on the file of the Court of the District Munsif of Srirangam, the plaintiff Pichu Aiyar died. Both his widow, Ruckmani Ammal, the present petitioner and his daughter Seethai Ammal, the present 2nd respondent, applied to be brought on as legal representatives. The District Munsif found that Ruckmani Ammal was a minor, who had no right to apply in her own right, and dismissed her application. Having done so he disposed of Seethai Ammal's application by merely recording "Defendant (present 1st respondent) has no objection." Ruckmani Ammal now applies to have both orders revised.

I cannot hold that the District Munsif acted irregularly in rejecting Ruckmani Ammal's application on the analogy of O. 32, R. 2. He exercised a discretion allowed him by law, though I think he exercised that discretion very hastily. Cf *Rattonbai* v. *Chabildas Lallo Bhoy* (1). But I cannot find that the District Munsif was justified in adding Seethai Ammal as legal representative without determining the question on its

1. (1888) I L R 13 Bom 7.

Ruckmani Ammal v. Veerasami Aiyangar.

merits after notice had gone to Ruckmani Ammal as she had raised the question. The mere fact that Ruckmani Ammal was discovered to be a minor was no reason for not considering her plea that she was the rightful representative. Here the analogy to be applied is that under O. 32, R. 3. The respondents do not attempt to justify the action of the Court which indeed is quite opposed to the ordinary duties of a Court in regard to minors, so much as to show that the petitioner has no right to move this Court for revision. They contend that her remedy was by way of appeal against the order, or at any rate by way of suit after reaching her majority, and in any case her application for review has been unduly delayed.

There is no statutory right of appeal against an order under O. 32, R. 3. "The legislature has chosen not to give a right of appeal against orders under that rule." *Lakshmi Achi* v. *Subbarama Aiyar* (2). But respondents rely upon *Ayya Mudali Velan* v. *Veerayee* (3) where it is held that an order rejecting the claim of a person to be the legal representative of a deceased plaintiff is appealable in cases where such orders have also the character of decrees. If it is to have this character, the order must conclusively determine the right of the parties in the suit, and it so happens that all the parties in *Ayya Mudali Velan* v. *Veerayee* (3) happened to be parties, in the suit, the 2nd defendant was the person applying to be plaintiff's legal representative. In *Lakshmi Achi* v. *Subbarama Aiyar* (2) and in the present case the persons applying to be legal representatives were never parties to the suit and this application having been rejected, they could never have been regarded as such and it is clear from *Ayya Mudali Velan* v. *Veerayee* (3) itself that the learned Judges still regarded *Lakshmi Achi* v. *Subbarama Aiyar* (2) as good law in regard to the facts of that case (*cf.* p. 815). I therefore find that petitioner had no remedy by way of appeal, and is entitled to move for revision.

I do not think it necessary to drive petitioner to a fresh suit, nor do I think that her remedy lies that way.. . The lower Court having appointed a legal representative that appointment, unless it is set aside, is final, and binds the estate "If the Court decides wrong the wronged party can only take the course prescribed by law for setting matters right ; and if

2. (1915) I L R 39 M 488 at 493 : 28 M L J 491.
3. (1920) I L R 43 M 812 39 M L J 218.

Ruckmani Ammal v. Veerasami Aiyangar.

that course is not taken the decision however wrong cannot be disturbed." *Malkarjun* v. *Narhari* (4).

I do not find that there has been inordinate delay. Petitioner first sought her remedy by way of review on grounds which were certainly not frivolous. Nor do I see any reason for holding that petitioner is still a minor, and even if she were, I should not reject her petition on that account ; there would only be a formal question of appointing a guardian *ad litem*. Accordingly I allow Civil Revision Petitions Nos. 401 and 402 with costs one set. I reverse the order of the lower Court and direct the District Munsif to determine the question whether Ruckmani Ammal or Seethai Ammal is or is not the legal representative of the deceased Pichu Aiyar and then proceed with the suit. Civil Revision Petitions Nos. 403 and 400 are dismissed with costs one set.

T. S. V. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Ramanathan Chettiar *Petitioner* (Accused in C. C. No. 236 of 1923 on the file of the 2nd class Magistrate, Sivaganga)*

v.

K. Sivarama Subramania Aiyar *Respondent (Complainant in do.).*

Ramanathan Chettiar v. Sivarama Subramania Aiyar.

Criminal Procedure Code, Ss. 435, 438 *and* 439—*High Court—Power of revision—Proceedings pending before subordinate Criminal Court—Charge of criminal misappropriation—Stay of proceedings pending decision of Civil Court.*

Under Ss. 435 and 439, Criminal Procedure Code, the High Court has power to interfere at any stage of a criminal case pending in a subordinate Court and to quash or set aside the proceedings if necessary in the interests of justice. Cases reviewed.

On an application to quash the proceedings before a Magistrate on a charge of criminal misappropriation against the accused, it was found that the dispute was the subject of litigation in a Civil Court and the High Court merely stayed the proceedings in the criminal case pending the decision of the Civil Court.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and S. 107 of the Government of India Act,

4. (1900) I L R 25 Bom. 337 at 347 10 M L J 368 (P C).

*Cr. R C No. 186 of 1924 (Cr R P No. 163 of 1924.) 27th March, 1924.

Ramanathan Chettiar v. Sivarama Subramania Aiyar.

praying the High Court to revise the order dated 26th January, 1924, of the Court of the Second Class Magistrate of Sivaganga in C. C. No. 236 of 1923.

C. S. Venkatachariar for petitioner.

The Public Prosecutor on behalf of the Crown.

S. Muthia Mudaliar for *P. S. Narayanaswami Aiyar* for respondent.

The Court made the following

ORDER :—The accused was charged with misappropriation of paddy worth about Rs. 200. Summons was issued to him and he now moves the High Court and asks that the proceedings before the Magistrate should be quashed.

The learned Public Prosecutor has contended that the High Court has no power to interfere with the proceedings of a Magistrate in a pending trial. Whether this contention is correct depends upon the interpretation of Ss. 435, 438 and 439 of the Criminal Procedure Code.

Under S. 435 the High Court is empowered to call for and examine the record of any proceeding before any inferior criminal Court and situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the *regularity of any proceedings of such inferior Court.* The section thus does not deal merely with " finding, sentence or order " but with proceedings generally and the power of the High Court extends to calling for and examining the record of any proceeding for the purpose of satisfying itself as to the regularity of such proceeding.

Under S. 438, the Sessions Judge or District Magistrate may, on examining the record of any proceeding, report for the orders of the High Court the result of such examination.

Then comes S. 439. It provides that in the case of any proceeding the record of which has been called for by the High Court or which otherwise comes to its knowledge, it may in its discretion exercise any of the powers conferred on a Court of Appeal by certain sections of the Code. The learned Public Prosecutor contends that none of the sections specified in S. 439 gives the High Court power to set aside or quash proceedings in a pending case. The answer is simple. The sections dealing with the powers of a Court of Appeal necessarily deal

Ramanathan Chettiar v. Sivarama Subramania Aiyar.

with those orders only from which under the Code there is an appeal provided. With reference to such orders, the sections lay down the powers of a Court of Appeal. *Ex hypothesi* the revisional powers of the High Court are invoked when no right of appeal exists, and although in some cases the High Court may by exercising the powers conferred on a Court of Appeal be able to correct an error, it does not follow, having regard to the variety of orders or proceedings which it may be called on to revise or deal with in its revisional jurisdiction, that it can by exercising those powers only redress a wrong or do complete justice. In other words, S. 439 does not say that the High Court shall exercise only those powers that are conferred on a Court of Appeal but on the other hand it enacts that among the powers possessed by the High Court are the powers conferred on an appellate Court. The sections dealing with the powers of an appellate Court necessarily describe and define the powers of the Court with reference to orders that are appealable. The legislature in enumerating the powers of the Court of Appeal had before its mind only a certain class of orders and in the very nature of things that enumeration cannot be found complete or exhaustive when the Court is called on to deal with orders of a different kind, orders not in the contemplation of the legislature when it was defining the powers of a Court of Appeal.

I am therefore of the opinion on a construction of the sections of the Code that the High Court has power at any stage to quash or set aside proceedings.

The authorities on the point support this view ; indeed, there is not a single reported case which supports the contention of the learned Public Prosecutor.

The circumstances which will justify the interference of the High Court have not been and cannot be laid down with precision. While the Judges repeatedly held that only when exceptional grounds exist the High Court ought to interfere, the decided cases show that no hard and fast rule can be laid down but that when in the interests of justice the High Court's intervention became necessary, it was not refused.

In *Chandi Pershad* v. *Abdul Rahiman* (1), *Jagat Chandra* v. *Queen-Empress* (2) and *In re S. Kuppuswami Aiyar* (3),

1. (1895) I L R 22 C 131. 2. (1899) I L R 26 C 786.
3. (1915) I L R 39 M 561 : 28 M L J 505.

Ramanathan Chettiar v. Sivarama Subramania Aiyar.

the High Court quashed proceedings after a charge had been framed.

In *Hari Charan* v. *Girish Chandra* (4), *Queen-Empress* v. *Nagasheppa Pai* (5) and in *Thackaria* v. *Pura Singh* (6), the High Court interfered upon the issue of summons to the accused.

In *Queen-Empress* v. *Jagan Singh* (7) and in *Chadha* v. *Emperor* (8), the High Court's intervention was sought for setting aside proceedings even at an earlier stage. The orders which the Court was requested to revise were to show cause why sanction should not be accorded for prosecution for forgery and perjury respectively.

Choua Lal v. *Ananta Pershad* (9) is an instance where the High Court refused to exercise this power. But the learned Judges even then observed that the High Court undoubtedly had the power to interfere in any case and at any stage of it.

In some of the cases mentioned above, the proceedings were set aside on the ground that the facts alleged did not in law constitute the offence with which the accused had been charged. In other cases, evidence was examined and probabilities were discussed and the High Court set aside the proceedings on the ground that it was not in the interests of justice that the proceedings should be allowed to continue.

In the four Calcutta cases and the Bombay case the decision in each was that of a Bench of two Judges.

The view I have taken of the sections of the Code is thus borne out by the authorities to which I have referred.

The question then remains to be decided with reference to the facts of the present case is the interference of the High Court justified? There is a *kattalai* attached to the Madura Devasthanam known as Nagappa Chetti *Kattalai*. The family of the accused had made the endowment. In 1915 a suit was filed for the settlement of a scheme in respect of this *kattalai*. In 1917, Venkatachellam Chetti, the brother of the accused, filed a suit for partition of the family property

4. (1910) I L R 38 C 68.

5. (1896) I L R 20 Bom 543. 6. (1922) 67 I C 589.

7. (1892) 12 A W N 102. 8. (1916) 14 A L J 851.

9. (1898) I L R 25 C 233.

and management of the villages that formed the subject of the endowment. In February 1921, the High Court finally decided in the partition suit that the accused was to be a trustee of the *kattalai* and immediately after, he got possession. In the other suit, the suit brought to settle a scheme, a scheme was settled on the 5th of August, 1921, and by it the trustee (the accused) was directed to submit yearly accounts, which were to be duly audited, and the balance in the trustee's hands was to be paid to the manager of the Madura Devasthanam. The complainant is one Alagappa Chetti, the Receiver appointed in respect of that Devasthanam. It is alleged that after the accused obtained exclusive possession of the property he passed two receipts to tenants, dated the 20th March, 1921, and 26th March, 1921, showing that a certain amount of paddy was received by him but that the account-books maintained for the *kattalai* show that the quantity of paddy received was much less. The difference is worth about Rs. 200 and odd and the charge is that the accused misappropriated paddy worth this amount.

In accordance with the decree settling the scheme the accounts for the Fasli corresponding to 1921 were filed by the accused. The auditor went through the accounts and submitted his report to the Court. Objections were filed to the report both by the accused and Alagappa Chetti. On the 6th of March, 1923, the Subordinate Judge made an order in effect disallowing the objections of Alagappa Chetty in regard to the alleged difference in the quantity of the paddy referred to above. Alagappa Chetti has filed no appeal against that order. But the accused himself has filed one challenging it in so far as it was against him. While this appeal was pending, on 3rd December, 1923, Alagappa Chetti gets a clerk of his to file the complaint and the summons was issued on 12th December, 1923.

Mr. C. S. Venkatachari for the accused has contended that the complaint was malicious and that the order of the Subordinate Judge was in his favour and with a view merely to harass his client the Receiver got the present complaint filed on account of private misunderstanding and spite. There are several proceedings before the High Court now which clearly show that Alagappa Chetti and the accused are on inimical terms and it is extremely probable that Alagappa Chetty is actuated by personal motives and that the prosecution has not

Ramanathan Chettiar v Sivarama Subramania Aiyar.

been launched in public interest. The receipts were given in March, 1921. The Subordinate Judge's order was made in March, 1923, and it is about nine months subsequent to it that the complaint was filed. It was open to Alagappa Chetty to place all the materials he could before the Subordinate Judge and he now pretends that he did not do so. His Vakil says that although on this particular point the order of the Subordinate Judge was against him, he may be able to support the order generally in the appeal that is pending by showing that his client is entitled to this particular amount which has been disallowed by the Subordinate Judge. Thus the matter is still in controversy between the parties in the Civil Courts and these facts lead to the inference that the prosecution is not *bona fide*. But the allegations made in the complaint if proved will constitute the offence of misappropriation. The materials on which either side may rely have not been placed before me and I am not in a position to say that the complaint is false. It may be that the motive of the complaint in preferring the charge may be bad but it does not follow that the proceedings for that reason should be quashed. I am not, therefore, prepared in the present case to set aside the proceedings wholly, but I think it is pre-eminently a case where the proceedings should be stayed pending the disposal of the appeal before the High Court (A. A. O. No. 314 of 1923) from the order of the Subordinate Judge. I accordingly make an order staying the proceedings pending the appeal. At this stage no further order will be necessary.

A. V. V. *Proceedings stayed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE RAMESAM.

Kummatti Veettil Kottaparambath Maliyakkal Kunhibi (dead) and others *Appellants** (*L. Rs. of the plaintiff*)

v.

The Secretary of State for India in Council represented by the Collector of Malabar and another *Respondents* (*Defdts*).

Maliyakkal Kunhibi *v.* Secretary of State for India.

Land Encroachment Act III of 1905, Ss. 6, 14—Notices to quit under S. 6, without actual eviction—Suit by party aggrieved by, to establish title—Limitation—Starting point—Plaintiff's right to elect any one of notices as affording cause of action so as to save limitation—Proceedings under the Act within meaning of S. 14—Proceedings not amounting to eviction if included.

Government claimed that certain land which was in the occupation of the plaintiff was their land and sent her a notice to quit under S. 6 of the Land Encroachment Act III of 1905. Nothing happened for a time. The plaintiff then put in a petition for a review of that notice to the Deputy Collector. The Deputy Collector dismissed the review petition, and shortly after an order which practically amounted to a notice to quit went to the plaintiff. Within six months of the dates of the last-mentioned notice and of the order rejecting her review petition but more than six months after the date of the notice first-mentioned, the plaintiff filed a suit for vindicating her alleged rights of ownership in the Civil Court, alleging in her plaint that the dismissal of her review petition and the communication of the last-mentioned notice was the proceeding on which the cause of action arose.

Held, that the suit was not barred by reason of S. 14 of the Land Encroachment Act.

S. 6 of the Act contains the machinery for eviction, and a person who has had notice under S. 6 and in spite of it remains in undisturbed possession cannot be said to be evicted from the land within the meaning of S. 14.

Quaere : Whether the illustrations contained in the explanation to S. 14 of the Act are not exhaustive, and a person may be aggrieved by proceedings under the Act when those proceedings do not amount to an assessment, penalty, eviction or forfeiture.

Assuming that the plaintiff should be deemed to have been aggrieved by the first-mentioned notice by reason of the fact that she petitioned to the Deputy Collector for a review of it, she nevertheless had the right to elect as to which stage of the proceedings she should complain against.

Second Appeal against the decree of the District Court of South Malabar in A. S. Nos. 3 of 1921 and 1053 of 1920 respectively preferred against the decrees of the Court of the

*S. A. Nos. 949 and 1341 of 1921. 26th March, 1924.

Maliyakkal Kunhibi v. Secretary of State for India.

Principal District Munsif of Calicut in O. S. Nos. 691 and 605 of 1919.

T. S. Visvanatha Iyer for appellant in S. A. No. 949 of 1921.

A. Krishnaswami Iyer for appellant in S. A. No. 1341 of 1921.

The Government Pleader for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS:—*S. A. No.* 949 *of* 1921 :—*The Chief Justice*:—In this case the plaintiff was in occupation of some land cultivating it by a tenant. Government claimed that it was their land, and on the 17th of April, 1919, they sent her a notice to quit under S. 6 of the Land Encroachment Act III of 1905. Nothing happened for a time. In May, 1919 the plaintiff put in a petition for a review of this notice to the Deputy Collector. On the 18th of September 1919 the Deputy Collector dismissed the review petition. On the 2nd of October, 1919 an order which amounted practically to a notice to quit went to the plaintiff. On the 22nd of December, 1919 the plaintiff filed the present suit for vindicating her alleged rights of ownership in the Civil Court.

The Courts below have declared that suit to be barred by limitation by reason of S. 14 of the Act which says, " Nothing contained in this Act shall be held to prevent persons deeming themselves aggrieved by any proceedings under this Act except as herein provided from applying to the Civil Court for redress." (That is what this woman has done). " Provided that the Civil Courts shall not take cognizance of any suit instituted by such persons for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose." Then follow two explanations " The cause of action shall be deemed to have arisen (*a*) in respect of any assessment or penalty " (that is a provision under another section which I have not dealt with) " on the date on which such assessment or penalty was levied ; (*b*) in respect of eviction or forfeiture, on the date of eviction or forfeiture. " S. 6 contains the machinery for eviction and it is provided that a notice shall be served on the person in occupation requiring him to vacate the land and, if such notice is not obeyed, by removing or deputing a subordinate to

remove any person who may refuse to vacate the same the Collector may give effect to it. How in the teeth of that provision anybody can venture to argue that a person who has had notice under S. 6 and in spite of it remains in undisturbed possession has been evicted from the land. I cannot understand, and I do not think it can fairly be said that any judgment of this Court has gone that length. But the case is put in another and a slightly—I will not say more plausible but a slightly—less unarguable way. It is said that the illustrations contained in the explanation to S. 14 of the Act are not exhaustive and that a person may be aggrieved by proceedings under this Act when those proceedings do not amount to an assessment, penalty, eviction or forfeiture. Assuming that argument to be sound, the plaintiff in this case put forward as the thing which she deemed to be aggrieved by not the notice at all which might have been a mere *fulmen brutum* which might have resulted in nothing whatever in the future but by a tangible definite order of the Deputy Collector received by her on the 2nd of October, 1919 ordering her to quit. How it can be said that the plaintiff must be deemed to be aggrieved by the earliest stage of the proceedings when she did not choose to be aggrieved by it I cannot appreciate. It is argued that though she says she was not aggrieved by the notice, she was obviously aggrieved by it because she petitioned the Deputy Collector to withdraw it or to review it. It seems to me that, assuming that to be so, it does not in the least preclude her from saying, "Well, if I was aggrieved by the notice in the sense that I put in a petition against it that is not what I am questioning in this suit here. I am aggrieved and for the purposes of this suit I am solely aggrieved by the order of the Deputy Collector of the 2nd of October, 1919." How anybody can deny her the right to elect as to which stage of the proceedings she should complain against passes my comprehension. In my judgment, the Full Bench decision in *Secretary of State* v. *Assan* (1) has no bearing on this point whatever, because there there was a question as to when there had been an infringement of the plaintiff's right ; and the plaintiff had a continuous claim of proceedings which began by his actually paying money out of his pocket in answer to a demand. To my mind, the Full Bench decision has no bearing on this point whatever.

1. (1915) I L R 39 M 727 : 30 M L J 255.

Maliyakkal Kunhibi v. Secretary of State for India.

The appeal must be allowed and the suit remanded for retrial. The appellants will have their costs of this appeal and in the lower appellate Court in any event. The Court-fee will be refunded to the appellants.

Coutts Trotter, C. J.

In S. A. No. 1341 *of* 1921 :—*The Chief Justice* :—*Same* judgment as in the connected S. A. No. 949 of 1921. There will be a similar order as to costs and refund of Court-fee.

Ramesam, J.

In S. A. No. 949 *of* 1921 :—*Ramesam, J.* :—I entirely agree. Assuming that all the causes of action that may arise under the Act are not exhausted by the explanation to S. 14 and assuming that a declaratory suit filed on account of proceedings taken under the Act also falls under S. 14, it is open to the plaintiff to deem herself aggrieved by whichever one of several proceedings taken against her she may choose. In the case in *Secretary of State* v. *Assan* (1) the plaintiff actually made a payment. In a case where a penal assessment has been paid it may be that it is not open to a plaintiff to say that he does not deem himself aggrieved by that payment, that he can ignore that payment and that he deems himself aggrieved by a later proceeding, because payment of money to another person in token of his proprietorship is practically a loss to himself and a recognition by him of the adverse title of the other. But in a case where there are a series of proceedings, being mere notices without any further attack against the title and enjoyment of the plaintiff, it is open to the plaintiff to choose the last of these things and say that he deems himself aggrieved by this and not by the earlier proceedings. I am aware there are some cases which, though they may not arise under the Act, imply that it is not open to a person seeking a declaration to so choose, but I do not agree with them. In this case in paragraph 9 of the plaint the plaintiff has clearly stated that the dismissal of her petition by the Deputy Collector and the communication of the 2nd of October 1919 is the proceeding on which the cause of action arose, which means that she felt herself aggrieved only by this and not by any earlier proceeding, for a declaratory suit. That being so, this second appeal must be allowed and I agree to the order proposed by my Lord the Chief Justice.

S. A. No. 1341 *of* 1921 :—*Ramesam, J.* :—I agree. It is contended by the learned Government Pleader in this case that

1. (1915) I L R 39 M 727 : 30 M L J 255.

there is an admission in paragraph 4 of the plaint that the plaintiff deemed himself aggrieved on the 19th of March, 1919; but seeing that a declaratory suit is an optional one and not compulsory, the view I take in such matters is that a person who wishes to file a declaratory suit has the right to say which of several proceedings taken against him (not amounting to adverse possession or enjoyment) is the particular proceeding by which he deems himself aggrieved for the purpose of filing a declaratory suit. In this case it may be that the plaintiff was aggrieved by several proceedings, but of these he chooses only the proceeding of the 26th of May, 1919 as the one by which he felt himself aggrieved for the purpose of filing the declaratory suit and not the earlier proceeding of the 19th of March, 1919. That being so, this second appeal is governed by the judgment in S. A. No. 949 of 1921.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Chintakayala Thammiah Naidu Garu *Petitioner* (Plaintiff)*

v.

Attili Musaliah (dead) and others *Respondents (2nd defendant and L. R. of the 1st defendant).*

Madras Local Boards Act (V of 1884), S. 73, Proviso—"Tenant"—Meaning of—Licensee from inamdar—Payment of local tax by intermediate landholder—Right to recover from licensee.

A licensee under a Dharmila inamdar in a Zamindari, for a period of ten years with a right to tap date trees, is not a "tenant" within the meaning of S. 73 of Madras Act V of 1884 so as to be liable to his licensor for the land-cess payable by the latter under the Act.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Vizagapatam in S. C. S. No. 242 of 1922.

B. Satyanarayana for petitioner

P. Somasundaram for respondents.

The Court delivered the following

JUDGMENT :—The question in this case is whether a licensee under the holder of a Dharimila Inam in a Zamindari

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*C R P No. 920 of 1922. 22nd April, 1924.

Thammiah Naidu v. Attili Musaliah.

for a period of 10 years with a right to tap date trees is a tenant within the meaning of the S. 73 of the Madras Act V of 1884, so as to be liable to his licensor for the land-cess payable by the latter under the Act. The plaintiff is an intermediate landholder and had under decree Ex. B to pay Rs. 131-2-6 to his landlord as land-cess for Faslis 1324 to 1326 *plus* costs of suit and he seeks to recover half of that sum from the licensees, the defendants.

The word "tenant" in the Act is defined to include all persons who occupy lands under a landholder. This definition is not illuminating, and considerations of the meaning of the word as used in other enactments do not afford much assistance either. It has no doubt been held, *e. g.*, that the ryotwari holder of a tree patta is an occupier of land within the meaning of S. 6 of the Madras Forests Act [see *Reference under S. 39 of the Madras Forests Act* (1)]. It would be unsafe to infer from that that a licensee of the right to tap date trees in a Zamin inam is a tenant within the meaning of the definition in Act V of 1884.

I think the question has to be looked at from a different point of view. The tax which plaintiff has to pay to the Zamindar is a "tax on the annual rent value of land." It is calculated under S. 64 (3) of the Act on "the annual rent payable to the landholder by his tenants," and the landholder is bound to furnish the Collector under R. 65, with a statement of the annual rent value of the lands occupied by his tenants or by himself. The word "rent" is not defined in the Act, and it is not clear whether or not it is intended to mean only the rent payable by an estate tenant as defined in the Madras Estates Land Act. I think it may be taken that the Local Boards Act does not contemplate any radical difference between the method of calculation of the rent value on ryotwari land and of the rent value on land held under any other tenure. Now in the case of ryotwari lands it is clear that the rent value is based on the assessment payable to Government for the land. Every one knows what that is, and I do not think it could be seriously argued that, if a ryotwari holder leased out date trees on his holding for tapping, the amount of that lease could be taken into account for the purpose of calculating the rent value of the land under S. 64 (1) of the Act. A ryotwari holder is bound so long as he holds the land and therefore so

1. (1889) I L R 12 M 203 (F B).

Thammiah Naidu v. Attili Musaliah.

long as he holds the right to lease out the trees upon it, to pay the assessment on the land. It is that and not the lease amount on which the tax will have to be calculated.

I do not see why any different principle should be applied to lands in an estate. The lease of trees on these lands does not abolish the rent payable on the lands to the landholder and it is not suggested in this case that that land rent has been abolished. It is asserted that the lands are uncultivable, but only because of a tradition that people who cultivate them do not prosper. The assessed land rate then still remains to provide the basis on which the tax leviable under this Act shall be calculated and the tax can be calculated legally on nothing else. If as a matter of fact the tax has been calculated on any other basis then the landholder himself will have to take action to have the mistake rectified.

It follows then that the amount payable under a license for tapping date trees on land which is already subject to land rent is not a proper basis for calculation of the rent value of the land, and is not "rent" as used in S. 64 of the Act. Even if a licensee be, in a manner of speaking, the tenant of the licensor, the latter cannot recover from the tenant anything not taken legally from him by the Collector and, as set out above, the Collector cannot, to my mind, legally collect from the landholder as tax under S. 64 of the Act any tax based on the amount of the license.

I therefore agree with the District Munsif that the suit must fail and dismiss the Revision Petition with costs.

A. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

C. Ganesa Mudaliar and another *Appellants** (*Pltffs.*)

v.

V. Gnanasikhamani Mudaliar and another *Respts.* (*Defts.*)

Ganesa Mudaliar v. Gnanasikhamani Mudaliar.

Transfer of Property Act, S. 58—Mortgage by conditional sale—Sale and agreement to re-sell—Intention of the parties—Terms of the document.

By a deed of sale dated 14th July, 1902, *A* conveyed property for its then full value to *B*, part of the consideration for the sale going in discharge of a

*S A No. 919 of 1921. 27th March, 1924.

Ganesa Mudaliar *v.* Gnanasikhamani Mudaliar.

pre-existing mortgage in favour of *B*. Under an agreement of even date, *B* agreed to re-convey the property to *A* on payment of the consideration recited in the sale-deed within 8 years. In a suit in 1919 by the heirs of *A* to redeem the property, *held*, that the transaction did not amount to a mortgage by conditional sale as there was nothing in the terms of the documents or in the surrounding circumstances to indicate that there should be a relationship of debtor and creditor between the parties or that the property should be security for the debt; and that the suit was not sustainable.

There is no presumption in favour of a mortgage by conditional sale. It is not the form of the document but the intention of the parties which is the deciding factor in finding out whether a transaction is a mortgage by conditional sale or a sale with a mere agreement for re-purchase. It lies on the party who contends that a document *prima facie* connoting an absolute sale is really a mortgage, to prove his contention.

Ayyavayyar v. *Rahimansa*, (1890) I L R 14 M 170 : *Maruthai Goundan* v. *Dasappa Goundan*, (1916) 31 M L J 375 : *Muthuvelu Mudaliar* v. *Vaithilinga Mudaliar*, (1919) I L R 42 M 407 : 36 M L J 385 relied on.

Second Appeal against the decree of the Court of the Subordinate Judge of Chingleput in A. S. No. 100 of 1920 preferred against the decree of the Court of Additional District Munsif of Chingleput in O. S. No. 159 of 1919.

K. Rajah Aiyar for appellants.

P. Somasundaram and *L. S. Veeraraghava Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The question in this case is whether Exhibits I and C, both dated 14th July, 1902, Ex. I being ostensibly a deed of absolute sale and Exhibit C an agreement by the vendee to reconvey the property at any time within 8 years on payment of the consideration recited in Exhibit I, constitute an out and out sale and an agreement for reconveyance or a mortgage by conditional sale. Both the lower Courts have held to the former view and it is urged that they are wrong.

That such a question is not a pure question of fact is clear from the numerous cases in which it has been allowed to be fully argued in second appeals before this Court.

The first defendant, vendee, under Exhibit I, was already holding an equitable mortgage on the property. The mortgagor, one C. Velayudha Mudali, was the owner of the property. He sold it to his mother-in-law under Exhibit B, evidently with a view to avoiding creditors. The first defendant was pressing for payment and the mother-in-law, 8 or 9 months after Exhibit B, executed this ostensible sale deed Exhibit I and the

Ganesa Mudaliar v. Gnanasikhamani Mudaliar.

first defendant executed the counter-part agreement Exhibit C, both being executed on the same day. The crucial question is, what was the intention of the parties ?

The plaintiffs argued that the fact that Velayudha Mudali sold the property first to his mother-in-law indicated his and her strong desire to keep the property in the family and that therefore it is likely that the lady did not intend to carry through an absolute sale, which would involve a total loss of the property to the family. But the sale was eight months after she had purchased from Velayudha Mudali and her and his desires are really no indication of what was the intention of the vendee, the first defendant on the date of Exhibits I and C. It is also pointed out that the first defendant says that he executed Exhibit C because the lady insisted on it, but I cannot hold that that necessarily indicates that she did not intend to sell. The 1st defendant may, as he implies, have given way to her importunity so far as to give her a chance of repurchase within a reasonable time. It is further pointed out that the consideration set out in Exhibit I is not described as the market value of the land but as the amount of the debt owing, to discharge which the sale was carried through, a point which I shall deal with later. On the other hand, both the lower Courts find that the amount of consideration was an adequate market value for the land. In Exhibit C there is not hint that the consideration for reconveyance was to be any amount calculated on the footing of the mortgage, and it contains no provision for interest on the mortgage amount. The expenses of the reconveyance were to be paid by the vendor and not by the vendee. It is also pointed out that the first defendant already held an equitable mortgage over the land and that there was little point in his changing one form of mortgage for another. It is also significant that the heirs of the ostensible vendor did not choose to challenge the nature of this sale until sixteen years later, eight years after the period fixed in Exhibit C for reconveyance.

Numerous cases have been cited to me laying down the principles by which the Court should be guided in a case like the present. That there is no presumption in favour of a mortgage by conditional sale is clearly laid down in the Full Bench case in *Muthuvelu Mudaliar* v. *Vaithilinga Mudaliar*(1). It is not the form of the document but the intention of the parties

1. (1919) I L R 42 M 407 36 M L J 385.

Ganesa Mudaliar *v.* Gnanasikhamani Mudaliar.

which is the deciding factor, and it rather lies on the party who contends that a document *prima facie* connoting absolute sale is really a mortgage to prove his contention. I shall not go through the cases in detail but one or two remarks may be made. An uncommon state of circumstances, for which there is no counter-part in this case, influenced the decisions in *Muthukaruppa Pillai* v. *Marudachalam Chetti* (2) and *Singaram Chettiar* v. *Kalyanasundaram Pillai* (3) and the judgment of Coutts Trotter, J., in *Kalappa Kamthi* v. *Kachur Sakha Rama Rao* (4). In *Ramayya* v. *Krishnamma* (5) the counterpart clearly showed that the relationship of debtor and creditor was to continue and the same is true of the case in *Kasturchand Lakhmaji* v. *Jakhis Padia* (6) where also the consideration was nothing like the actual market value of the land. In the Privy Council case in *Balkishen Das* v. *W F. Legge* (7) their Lordships clearly held that the tenor of the agreement indicated that the parties intended in the event of purchase that the provisions of Regulation I of 1798, which was applicable to the redemption of mortgages by conditional sale, should alone be followed—a very clear indication of what the intention of the parties was. The other cases quoted to me were all cases in which the final decision of the Court was that the transaction was an out and out sale and not a mortgage by conditional sale. The documents in the present case seem to me to bear most resemblance to those in *Ayyavayyar* v. *Rahimansa* (8), *Maruthai Goundan* v. *Dasappa Goundan* (9) and *Muthuvelu Mudaliar* v. *Vaithilinga Mudaliar* (1). The mere fact that the deed of sale does not say that the amount of consideration is the market value of the land is unimportant. The same omission appears in the sale deed in *Muthuvelu Mudaliar* v. *Vaithilinga Mudaliar's Case* (1). I can find no clear indication that the parties here intended to perpetuate the relationship of debtor and creditor, and that is the crucial test in the case. I am unable to hold that the lower appellate Court misdirected itself or committed any error of law in concluding that the suit transaction was an out and out sale and not a mortgage. I see no reason to interfere and dismiss this appeal with costs.

A. V. V. *Appeal dismissed.*

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1. (1919) I L R 42 M 407 36 M L J 385.
2. (1914) 27 I C 436.
3. (1914) 1 L W 687.
4. (1915) 29 I C 898.
5. (1899) I L R 23 M 114 : 9 M L J 361.
6. (1915) I L R 40 Bom. 74.
7. (1899) I L R 22 All. 149 (P C).
8. (1890) I L R 14 M 170.
9. (1916) 31 M L J 375.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE RAMESAM.

Al. Vr. Ct. Lakshmanan Chetti and others — *Appellants** (*Petitioners*)

v.

V. R. Rm. V. L. Subbiah Chetti (dead) and others — *Respondents* (*Respondents Nos.* 1 *to* 12 *and L. Rs. of the* 1*st respondent*).

Lakshmanan Chetti *v.* Subbiah Chetti.

Limitation Act, S. 7—Joint decree-holders—Hindu father and minor sons—Father next friend and guardian in the suit—Capacity to give discharge—Civil Procedure Code, O. 32, R. 6—Execution application—Limitation—When commences.

A decree was obtained in a suit in which the plaintiffs were a Hindu father and his minor sons, the latter being described on the face of the proceedings as suing through their next friend and guardian, the father. The father died soon after the decree, and the eldest of the minors filed an execution application within three years of attaining majority but more than three years after the decree. *Held,* as the father was the next friend of his minor sons, he was not in a position to give a good and legal discharge without the consent of the Court whose permission was necessary under O. 32, R. 6, Civil Procedure Code, and hence under S. 7, Limitation Act, time did not run from the date of the decree but only after the disability, *i. e.,* minority ceased. The application for execution was therefore within time. *Ganesh Rao* v. *Tuljaram Rao* (1915) I L R 36 Mad. 295 : 25 M L J 150 (P C) applied.

Per the Chief Justice :—When a Hindu father acting as the next friend of his minor sons obtains a decree, his power to give a valid discharge under the Civil Procedure Code is different from his powers as father under the general Hindu Law. The inhibition imposed on him in the one character under O. 32, R. 6 must be extended to the other character.

Appeal against the order, dated the 24th January, 1921, of the Court of the Additional Subordinate Judge of Ramnad at Madura in E. A. No. 48 of 1920 in O. S. No. 224 of 1911.

K. V. Krishnaswami Aiyar and *V Rajagopala Aiyar* for appellants.

A. Swaminatha Aiyar for respondents.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This case furnishes a signal instance of the mischievous tendency of the Courts in this country to evade, or endeavour to evade, plain statutory mandates, and in no sphere of the law, so far as I have observed, has that tendency been more freely exercised than in that

Coutts Trotter, C. J.

*A A O No. 222 of 1921. 26th March, 1924.

Lakshmanan Chetti v. Subbiah Chetti.

Coutts Trotter, C. J.

branch of the law we are concerned with in the present case, namely, the Law of Limitation. The way in which this matter stands is as follows:—In October 1913, a decree was obtained in a suit in which the plaintiffs were a father and his three sons, and the three sons were described on the face of the proceedings as suing through their next friend and guardian, the first plaintiff (that is, the father). Two months after that decree the father died and it was not until December of the following year, 1914, that the eldest of the three sons attained his majority. On the 3rd December, 1917, well within three years of the attainment of majority, an execution application was taken out. It is said that that application was barred because time must be taken to have run not from the attainment of majority of the eldest son but from the date of the decree itself, *i. e.*, October, 1913. The reason for it is said to be this and it depends upon the construction of two sections of two statutes. One the learned Judge has referred to, and the other he has not. Before I approach the consideration of the case-law I will look at the sections of the statutes themselves. The relevant section of the Limitation Act is S. 7. It says this :— " Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability (that means, for our present purpose, the minority) and a discharge can be given without the concurrence of such person, time will run against them all ; but where no such discharge can be given time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased. "

Therefore a good discharge, which could be given without the concurrence of the others is necessary before limitation can be invoked. Now, it is said that the father in this case became entitled to give a good discharge as soon as the decree was passed, and to give a good discharge not only on behalf of himself but on behalf of his minor sons. This Court held in a number of cases culminating in the case of *Ganesh Rao* v. *Tuljaram Rao* (1) that a Hindu father could, as managing member of a family, give a good discharge of a decree debt notwithstanding the fact that he might appear in the suit in the capacity of guardian *ad litem* or next friend. They based that decision upon the express provisions of Hindu Law and

1. (1909) 21 M L J 1093.

they said that his position as a father was independent of his position as guardian *ad litem* or next friend and that no disability which could attach to him can be supposed to attach to him by reasons to which I am coming presently and could in any way affect his position under the general Hindu Law as father. That is the decision of this Court in several cases culminating in *Ganesh Rao* v. *Tuljaram Rao* (1). What their Lordships were dealing there with was an argument based upon a section of the Civil Procedure Code. That section is the present Rule 6 in O. 32 and it reads as follows :—" A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either (*a*) by way of compromise before the decree or order, or (*b*) under a decree or order in favour of the minor. " As I said, the basis of the decision in *Tuljaram Rao's Case* (1) was that the father occupied two entirely separate positions, that he was clothed with a double personality, and that inhibition of his acting in a certain manner in one of those capacities was no inhibition of his doing it under the other, the general powers of a Hindu father. Thereupon *Tuljaram Rao's Case* (1) went to the Privy Council with this pronouncement of the Madras High Court to deal with and to say whether it was right or whether it was erroneous, and the words of the Privy Council are absolutely explicit in their application of the principle laid down by the Madras High Court and which, so far as I can see, is the necessary substratum of the whole of the argument that has been addressed to us. What their Lordships say is this " They (their Lordships of the Privy Council) consider it to be clear that when he (that is, the father) himself is the next friend or the guardian of the minor, his powers are controlled by the provisions of the law and he cannot do any act in his capacity as father or managing member which he is debarred from doing as a next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment. " In other words, their Lordships say in the plainest language, the inhibition imposed upon him in one character must be extended to the other suggested character or else the Act becomes a waste paper. It is said that there are decisions of this Court subsequent to that pronouncement of the Judicial Committee which nevertheless go on saying that a father can give a good dis-

1. (1909) 21 M L J 1093.

Lakshmanan Chetti v. Subbiah Chetti. — Coutts Trotter, C. J.

charge without the consent of the Court where the decree has been obtained. I am not at all sure that those cases—most of them are very inadequately reported—do purport to go counter to the principle laid down in *Tuljaram Rao's Case* (1), because it is not quite plain, so far as I can see, that, in those cases, the father was the guardian *ad litem* of the minors. All I can say is that, if he was the guardian, the Privy Council decision compels me to say that those cases were wrongly decided ; if he was not, they merely say that where the father is not the guardian *ad litem* he can take the money and give a good discharge and though I do not disagree with that, I would like to reconsider that position hereafter. I am not saying that if this was what those cases had decided, those cases are incorrect but I am quite clear about this, that if in those cases, the father was the guardian *ad litem,* they are clearly wrongly decided and decided in the teeth of the express mandate of the Privy Council case. No one, I think, could plausibly contend that a man in such a double position could give a good discharge. He can only give a discharge after obtaining the permission of the Court. It therefore follows that at the time when the father died, he had never been in a position to give a good and legal discharge for this debt and that therefore the time must be calculated as beginning to run from the date when the respective disabilities cease. Seeing that one of the decree-holders is still a minor there is really no question of limitation arising in the case. The case will go back for further proceedings in execution.

The appellants will have their costs throughout.

Ramesam, J.

Ramesam, J. :—I agree.

Several decisions of this Court have been referred to by the learned vakil for the respondent. The first of these is the decision in *Duraiswami Sastrial* v. *Venkatrama Iyer* (2). It expressly purports to be based on the decision in *Ganesh Rao* v. *Tuljaram Rao* (1) which was a decision of this Court on O. 42, R. 7. It was reversed afterwards by the Privy Council in *Ganesh Rao* v. *Tuljaram Rao* (3). This was followed by a single Judge in *Ramanadhan Sivayya* v. *Udatha Atchayya* (4). The next case is *Palaniandi Pillai* v.

2. (1911) 21 M L J 1088. 1. (1909) 21 M L J 1093.

3. (1913) I L R 36 M 295 : 25 M L J 150 (P C).

4. (1913) M W N 288.

Papathi Ammal (5). It is true that this was after the decision of the Privy Council but no reference was made in the argument to O. 32, R. 6 or to the fact that the decision in *Ganesh Rao* v. *Tuljaram Rao* (1) on which the decision in *Duraiswami Sastrial* v. *Venkatrama Iyer* (2) was based, had been reversed by the Privy Council. This was again followed in *Venkatasubbiah* v. *Venkateswarlu* (6) and the same remarks apply to this case also. In *Rati Ram* v. *Niadar* (7) the decree was obtained by a single decree-holder. There was no minor among the original plaintiffs. The original decree-holder died leaving two sons, one a major and the other a minor. The major son on behalf of himself and acting as the next friend for his younger brother applied that they should be made legal representatives in the place of their deceased father. Before the order was made on the application the applicant died, and on the day the application came on for hearing, nobody appeared and the petition was dismissed. The result was they were not made parties so that it is not a case where we have two decree-holders one of whom is a major and the other a minor represented by the major as next friend. O. 32, R. 6 cannot apply to the facts of that case. That case is therefore correctly decided and cannot therefore help us in this case.

Lakshmanan Chetti v Subbiah Chetti. — Ramesam, J.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Ganjain Manikyamba and another *Appellant** (*Plaintiffs*)

v.

Pasala Mallayya and others *Respondents* (*Defendants*).

Ganjain Manikyamba v. Pasala Mallayya.

Madras Estates Land Act, S. 3 (5)—Darmila inam lands—Suit for possession by inamdars against tenants—Jurisdiction—Civil or revenue Courts—Inamdars alleging to be originally kudivaramdars only—Subsequent grant of melvaram—Effect of.

The plaintiffs who were darmila inamdars brought a suit in a Civil Court for recovery of possession of the suit properties on the strength of oral lease given to the defendant. They alleged that they owned the kudivaram interest

5. (1914) M W N 159.
1. (1909) 21 M L J 1093.
2. (1911) 21 M L J 1088.
6. (1917) M W N 816.
7. (1919) I L R 41 All 435.

*A A O No. 433 of 1922. 23rd April, 1924.

Ganjain Manikyamba v. Pasala Mallayya.

to start with and that it was only subsequently that they obtained by grant the melvaram interest from the Zamindar. On the question arising whether the suit was cognizable by the civil or revenue Courts, *held,* if the plaintiffs proved that they originally owned the kudivaram and were subsequently granted the melvaram they would not be landholders within the meaning of S. 3 (5) of the Estates Land Act and could maintain the suit in the Civil Court. *Brahmayya* v. *Achiraju,* (1922) I L R 45 M 716 43 M L J 229 (F B) distinguished. *Marina Veeraswami* v. *Boyinapally Venkatrayudu,* (1920) 39 M L J 225 (F B) followed.

Appeal against the order, dated 21st April, 1922, of the Court of the Additional Subordinate Judge of Cocanada in A. S. No. 20 of 1921 (preferred against the order of the Court of the District Munsif of Ramachandrapuram in O. S. No. 692 of 1917).

Ch. Raghava Rao for appellant.

K. Srinivasa Rao for respondents.

The Court delivered the following

JUDGMENT :—This appeal is against an order of the Sub-Judge of Rajahmundry returning a plaint to be presented to the proper Court ; and the Subordinate Judge held that the Civil Court had no jurisdiction to try the suit but only the Revenue Court had. The suit was for the recovery of possession of certain properties on the strength of a lease alleged to have been given orally to the 1st defendant by the 2nd plaintiff. The defendant denied the lease and claimed occupancy rights in the lands and also pleaded that the plaintiff as Inamdar was a landholder within the meaning of the Madras Estates Land Act and therefore this suit could not be tried by the Civil Court. The Subordinate Judge decided on the first part of issue 3 that the suit land is a Darmila inam; and that finding we must accept. He then considered himself bound by the ruling of the Full Bench reported in *Brahmayya* v. *Achiraju* (1) to hold that the plaintiff as a Darmila inamdar was a landholder within the meaning of the Act, and therefore the Civil Court had no jurisdiction to try this suit, and he directed the plaint to be returned to the proper Court. It is pointed out to us that the plaintiffs' case was that they owned the kudivaram interest to start with in this land and that it was only subsequently that they obtained by grant the melvaram interest from the Zamindar. It was argued that, when a kudivaramdar gets by transfer or otherwise the melvaram interest in the

1, (1922) I L R 45 M 716 43 M L J 229 (F B).

Ganjain Manikyamba v. Pasala Mallayya.

land, the kudivaramdar does not lose his kudivaram interest thereby, and the persons who were in occupation of the lands as tenants under him as kudivaramdar do not become ryots and do not get kudivaram rights automatically transferred to them by the transfer of melvaram rights to the original kudivaramdar. The Full Bench case referred to is sought to be distinguished from the present case on this ground. In the Full Bench case the transfer was of both the varams simultaneously to the grantee and the question arose whether under those circumstances the suit by the grantee for rent should be tried by the Revenue Court or the Civil Court. The question depended upon whether he was a landholder within the meaning of the Act or not. The majority of the Judges held that in the circumstances he was landholder.

Here we have a different case put forward by the plaintiff, namely, a case of the transfer of melvaram to a person who already owned the kudivaram right. If the plaintiff was a kudivaramdar to start with before the melvaram right was transferred to him his position is different from the position of the parties in the Full Bench case. The Subordinate Judge has not considered the question whether the plaintiff's allegation, that he was a kudivaramdar to start with, is true or not. The District Munsif discussed the question and came to the conclusion that the plaintiff's allegation was true. That finding of the District Munsif has not been displaced by the Subordinate Judge. We must, therefore, for the purpose of deciding this appeal, assume that the plaintiff was a kudivaram dar before he got the melvaram interest. In such circumstances we are of opinion that the ruling in the Full Bench case above cited will not apply. The Estates Land Act itself in the explanation to S. 6 recognises that a person owning a right of occupancy already in the land does not lose it subsequently by getting the interest of the landholder in the lands. No doubt, as pointed out by Mr. Justice Oldfield in the Full Bench case there is some difficulty in reconciling this explanation with S. 8. We must take it that S. 8 must be read subject to the explanation in S. 6. A question similar to the one before us arose before another Full Bench in this Court on a former occasion in *Marina Veerasami* v. *Boyinapally Venkatrayudu*(2). It was held by that Full Bench of five Judges that a person who was already the owner of the kudivaram right and to

2. (1920) 39 M L J 225 (F B).

Ganjain Manikyamba v Pasali Mallaiya.

whom the Zamindar granted the melvaram subsequently is not a person holding an estate or part thereof, and is also not a person entitled to collect the rent by virtue of a transfer from the owner or his predecessor in title within the meaning of S. 3 (5) of the Estates Land Act, and therefore he did not acquire the status of a landholder in consequence of the grant by the Zamindar and his suit was maintainable in the ordinary Civil Court against his tenants for recovery of rent. The authority of that Full Bench is still subsisting and it has not been overruled by any subsequent Full Bench of this High Court. We must therefore hold that the Subordinate Judge was not right in disposing of this case without going into the question whether the plaintiff owned the kudivaram interest before the melvaram was granted to him. If he finds that the plaintiff had no kudivaram interest at all, that he became an inamdar solely by virtue of the grant made by the Zamindar of melvaram rights, his view that the plaintiff could not maintain the suit in the Civil Court would be right ; but if, on the other hand, he comes to the conclusion, as the Munsif has done, that the plaintiffs owned the kudivaram interest before they became entitled to the melvaram by the grant by the Zamindar, the Full Bench case in *Marina Veerasami* v. *Boyinapally Venkatrayudu* (2) already referred to, will apply, and the present case will have to be tried by the Civil Court. In the latter case the Subordinate Judge will consider the other issues in the case and dispose of the appeal himself. In the former case the order returning the plaint would be re-affirmed. We therefore set aside the order of the Subordinate Judge and remand the appeal to him to be disposed of in the light of the observations made above. Costs will abide and follow the result of the appeal. The Court-fee paid for the appeal in this Court will be refunded to the appellant.

T. S. V. *Appeal reversed and remanded.*

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2. (1920) 39 M L J 225 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE DEVADOSS.

Meyappa Chettiar *Petitioner* (Counter-petitioner)*

v.

Chidambaram Chettiar *Respondent (Petr.)*

Meyappa Chettiar v. Chidambaram Chettiar.

High Court—Judge of, absent on other service—If ceases to be a Judge of the Court—Full Bench judgment—Validity—One of Judges absent on other duty when judgment was pronounced—Effect.

A Judge of the High Court who does not resign his appointment does not cease to be a Judge of that Court during his temporary absence on other service.

A Full Bench judgment of the High Court is not invalid merely because it was pronounced at a time when one of the Judges constituting the Full Bench was absent on other duty.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Ramnad at Madura, dated the 30th March, 1921, in E. A. No. 285 of 1920 in E. P. No. 142 of 1920 (in O. S. No. 124 of 1914 on the file of the Temporary Subordinate Judge's Court of Ramnad).

K. V Krishnaswami Aiyar and *K. Balasubramania Aiyar* for petitioner.

C. V Anantakrishna Aiyar, C. S. Venkatachariar and *A. Swaminatha Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—As the Full Bench has now decided that the attachment by the decree-holder in O. S. No. 153 (124) of 1914 was not subsisting when the petitioner in this Civil Revision Petition applied to execute his decree and enforce his security, the application for rateable distribution after the dismissal of E. P. No. 182 of 1916, was not regular and the lower Court's order cannot be supported. We allow this Civil Revision Petition with costs in this Court including costs before the Full Bench.

An objection was taken to the validity of the Full Bench judgment on the ground that it was pronounced at a time when Mr. Justice Coutts Trotter was absent on deputation in connection with the enquiry of the Bar Committee. As that learned Judge did not resign his appointment, he did not cease to be

*C R P No. 796 of 1921. 4th March, 1924.

Meyappa Chettiar *v.* Chidambaram Chettiar.

a Judge of this Court during his temporary absence on other service, and the cases quoted in *Mahomed Akil* v. *Asad-un-nisa Bibee* and *Mutty Lal Sen Gywal* v. *Deshkar Roy* (1) and *Chinnu Pillai* v. *Kalimuthu Chetti* (2), are therefore not in point. The objection to the judgment of Mr. Justice Coutts Trotter being treated as a part of the judgment of the Full Bench thus fails.

A. S. V.

[FULL BENCH]

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

V. Manickam Pillai — *Petitioner* (6th Defendant)*

v.

Mahudum Bathummal and others — *Respondents (Plaintiff and defendants Nos.* 1 *to* 5 *and* 7).

F. B.

Manickam Pillai *v.* Mahudum Bathummal.

Civil Procedure Code, O. 9, *R.* 2—*Plaintiff—Non-appearance—Pleader asking for adjournment and reporting no instructions in case of its refusal—O.* 3, *R.* 4 (2)—*Withdrawal of vakalat—What amounts to—Leave of Court for withdrawal—Grant of—Resumption—Conditions.*

On the day fixed for the hearing of the suit the plaintiff's vakil, who had previously filed a vakalat in the ordinary form, appeared in Court, asked for an adjournment, and stated that, if that adjournment was not granted, he had no further instructions to go on with the case. He also took the plaint which he had drawn and signed and endorsed on it as follows : "I have no instructions except to apply for an adjournment."

Held, that the pleader could not be deemed to have appeared.

O. 3, R. 4, sub-r. (2) of Civil Procedure Code does not require the writing containing the withdrawal by the pleader of his vakalat to be in any specified form, and that which the plaintiff's pleader had endorsed on the back of the plaint would be a perfectly good written withdrawal from his duties and obligations under the vakalat.

No formality is necessary about the leave of the Court required for the withdrawal of the pleader, and in the circumstances of the case, the Court ought to be presumed to have given its consent to the withdrawal of the plaintiff's vakil within the meaning of sub-r. (2) of R. 4 of O. 3 of Civil Procedure Code.

Petition under S. 115 of Act V of 1908, praying the Hign Court to revise the order of the Court of the Subordinate Judge of Tuticorin, dated the 2nd day of August, 1922, and made in Interlocutory Application No. 558 of 1922 in O. S. No. 16 of 1921.

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1. (1867) 9 W R 1.
2. (1911) I L R 35 M 47 : 21 M L J 246.

*C R P No. 899 of 1922. 11th April, 1924.

P. V Krishnaswami Aiyar for petitioner.

A. Swaminatha Aiyar and *K. R. Rangaswami Aiyangar* for respondents.

The Court expressed the following

OPINION :—*The Chief Justice* :—In this case the plaintiff's vakil appeared in Court on the day fixed for the hearing of the suit, asked for an adjournment and stated that, if that adjournment was not granted, he had no further instructions to go on with the case. He had previously filed a vakalat in the ordinary form. He did something more than the mere asking for an adjournment. He took the plaint which he had drawn and signed and endorsed on it as follows " I have no instructions except to apply for an adjournment. (Signed) A. V. Krishnaswami Aiyar, vakil for the plaintiff (with the date)."

The relevant provision of the Code is said to be O. 3, R. 4. Sub-rule (1) of that rule is " The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by the power of attorney to act on this behalf." Sub-rule (2) is, " Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be, and filed in Court. "

It is sought to be said here that, although this vakil wrote what I have read on the back of the plaint after having filed a vakalatnama, the vakalatnama must be considered to continue in force until something further was done, and it is also argued that the effect of the vakalatnama being considered to be in force is to make the pleader constructively appear in a proceeding in which he has explicitly stated that he does not appear. In our opinion, the statute does not require the writing containing the withdrawal by the pleader of his vakalat to be in any specified form, and it appears to us that that which he has endorsed on the back of the plaint would be a perfectly good written withdrawal from his duties and obligations under the vakalat. That is really sufficient to dispose of this case, and Mr. Krishnaswami Aiyar very frankly said that, if we take that view as to the proper construction of the writing, the case, so far as he is concerned, was unarguable. But, while basing our decision on that short ground, we think, in view of

F. B.

Manickam Pillai v. Mahudum Bathummal.

Coutts Trotter, C J

some decision of this Court,—one a very recent decision and the other which is unreported—that we ought to point out that when this matter has been discussed in those cases, attention does not seem to have been drawn to the decision of the Privy Council, *Radha Kishan* v. *The Collector of Jaunpur* (1). The facts of that case are set out in a quotation from the judgment of the Subordinate Judge, which runs as follows " That day (*i. e.*, the day fixed for hearing) the pleader for the applicant stated that he could not conduct the case, and he had received no instructions from his client. Thereupon the Court proceeded to try the case and tried and decided the issues on the evidence adduced on the plaintiff's behalf and decreed the suit against the applicant. " Their Lordships held in that case that the applicant could not be held in the circumstances to have appeared. We trust that when this matter comes before the Courts again notice will be taken of that decision, because, so far as appears, a wider question is determined there, as there is no statement— a feature that exists in this case—to the effect that the pleader has filed an instrument in writing taking himself out of his vakalat, a withdrawal on his part which O. 3, R. 4 contemplates.

The exact question put to us is, whether when a pleader reports no instructions, whether after he has asked for an adjournment, and been refused or not, the Court is correct in holding that the party for whom the pleader was appearing has not appeared. We think that the only answer can be that, at any rate, in the circumstances of this case, the pleader cannot be deemed to have appeared.

I should add one other word. The section says that the withdrawal of the pleader must be with the leave of the Court. It does not say, nor do I think we are to import into it, that any formality is necessary about the leave of the Court and in the circumstances, we must presume that, in a case like the present, the Court in assenting to the conduct of the vakil and in raising no question about his withdrawal, must be taken within the meaning of the section to have given its consent.

The case will go back to the single Judge for disposal on any point not determined by this Full Bench.

Ramesam, J.—I agree.

Wallace, J.—I agree.

Reference answered.

1. (1900) I L R 23 A 220.

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, LORD CARSON AND SIR JOHN EDGE.

Kenchava Kom Sanyellappa Hosmani and another *Appellants** (*Defendants*)

v.

Girimallappa Channappa Somasagar *Respondent* (*Plaintiff*).

P. C

Sanyellappa Hosmani *v.* Channappa Somasagar.

Hindu Law—Succession—Priority among Bandhus—Conviction for murder as a disqualification from inheritance—Public policy—Distinction between legal and equitable estates inapplicable.

Among Hindus, a murderer is absolutely disqualified from inheriting the estate of his victim, or transmitting any title in respect of it ; and the differentiation between legal and equitable estates, which exists in English Law, is inapplicable to Hindu Law.

Judgment of the High Court affirmed.

The law as to priority between Bandhus in the Bombay Presidency and other parts of India considered.

Gangu v. *Chandrabhagabai,* (1907) I L R 32 Bom 275 ; *Narasimma* v. *Mangammal,* (1889) I L R 13 Mad 10 ; *Vedachella Mudaliar* v. *Subramania Mudaliar,* (1921) 48 I A 360 ; *Saguna* v. *Sadashiv,* (1902) I L R 26 Bom 710 ; *Rajah Venkata Narasimha* v. *Rajah Surenani,* (1908) I L R 31 Mad 321 *Balkrishna* v. *Ramkrishna,* (1920) I L R 45 Bom 353 referred to.

Appeal from a judgment and decree (1st September, 1920) of the High Court (reported in I. L. R. 45 Bom. 768), reversing a judgment and decree (15th March, 1919) of the First Class Subordinate Judge of Dharwar.

The facts appear sufficiently from the judgment of their Lordships.

The respondent (plaintiff) sued the appellants (defendants) for possession of the estate of Parappa (*vide* genealogical table below). The Subordinate Judge (H. V. Chinmulgund, Esq.) on the 15th March, 1919, passed a decree in favour of the plaintiff for a 1|3rd share, with 1|3rd of the mesne profits, holding that, in virtue of the ruling in *Vedanayaga Mudaliar* v. *Vedammal* (1), the murderer took the legal estate, but forfeited the beneficial interest. Upon appeal by the plaintiff, and cross-objections by the defendants,

*P C Appeal No. 100 of 1922. 19th June, 1924.

1. (1904) I L R 27 M 591 14 M L J 297.

P. C.

Sanyellappa Hosmani v. Channappa Somasagar.

the High Court (Macleod and Fawcett, JJ.) allowed the appeal, and passed a decree in the plaintiff's favour for the whole estate, holding that, as there was no direct provision of Hindu Law bearing upon the subject, the principles of justice, equity and good conscience should serve as a guide on the question of priority, they held that a male succeeded in preference to a female standing in the same degree of relationship, even where he was descended from a female in another *gotra,* and she was born in the *gotra* of the intestate of a male.

The defendants thereupon appealed to His Majesty in Council.

E. B. Raikes for appellants :—Hanmappa was a nearer heir to the intestate than the respondent, and, therefore, the latter's suit should have been dismissed. The Hindu Law was in fact applicable to the parties, and that law does not include murder, or, at any rate, the murder of a person of the Sudhra caste, among the disabilities of inheritance. If in fact there is any law excluding a murderer from inheriting the estate of his victim, the estate inherited in this case was not the estate of the murdered Chanbasava. In any event, if Hanmappa was excluded from beneficial inheritance on his conviction, that exclusion did not extend to his heirs ; and if the appellants were excluded from inheritance as the heirs of Hanmappa, they were entitled to succeed as nearer heirs to the intestate than the respondent.

The respondent was not represented.

19th June, 1924. The Judgment of the Board was delivered by

Lord Phillimore.

LORD PHILLIMORE :—This case involves some questions of importance. The parties are all relations, descendants of one Hanmanna. He had three children—a daughter, Basava, whose son Girimallappa Channappa Somasagar is the plaintiff and present respondent ; a son Vadakappa who had two daughters, Kenchava and Gangava—who are the defendants and present appellants—and a son Hanmappa—of whom more hereafter. The third child of Hanmanna was another son, Ramanna since deceased. Ramanna married Chanbasava; they had no children, but they adopted as a son, Parappa. He died a month after Ramanna. Thereupon,

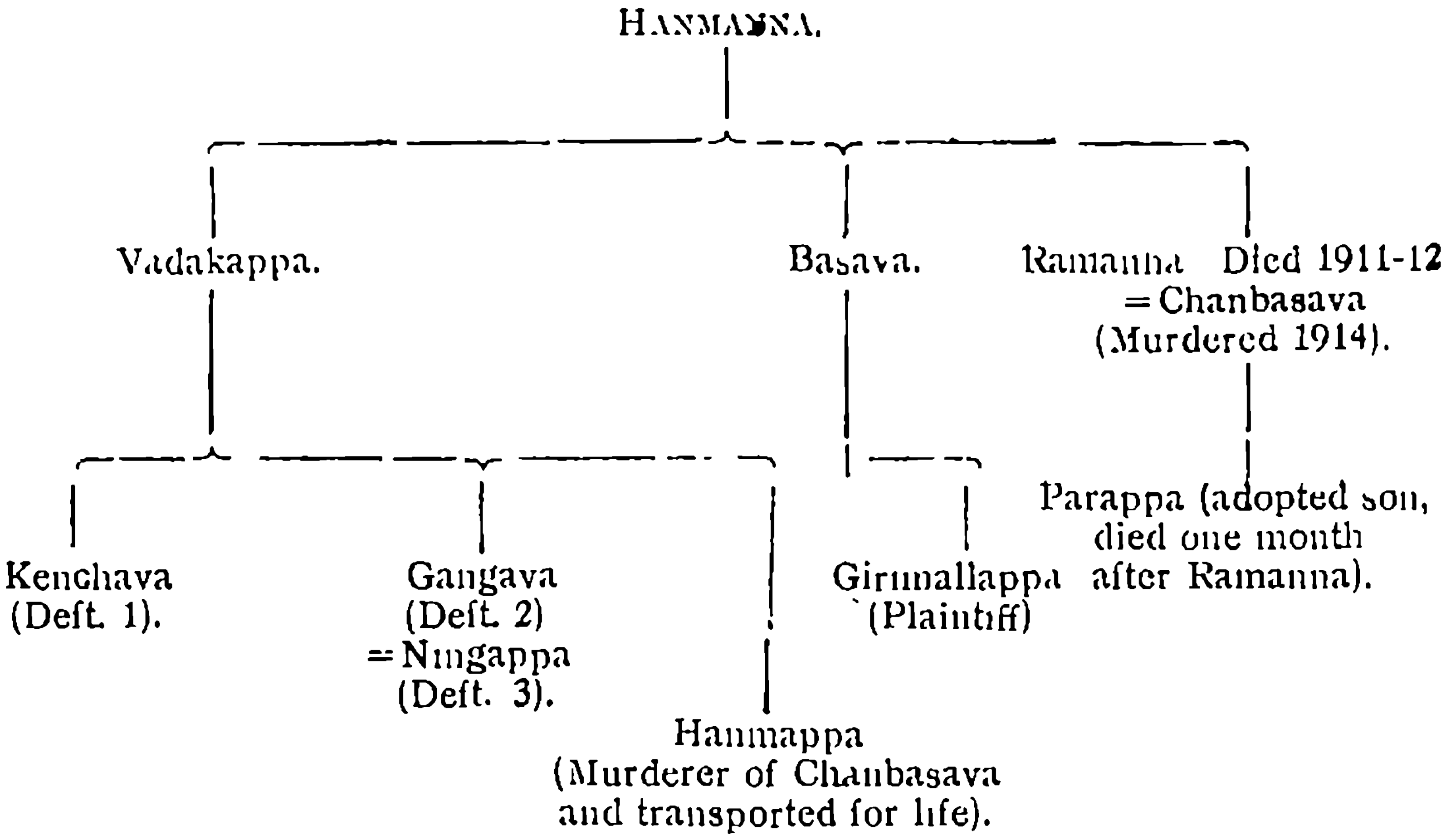
P. C.

Sanyellappa Hosmani *v.* Chanrappa Somasagar.

Lord Phillimore.

his adoptive mother Chanbasava succeeded to the property for the ordinary Hindu woman's estate, and upon her death, descent would have to be traced to Parappa as the propositus ; and Hanmappa if he survived Chanbasava would be the natural heir to Parappa.

The relationships can be illustrated on a genealogical table, thus :—



In 1914, Hanmappa had a quarrel with his aunt Chanbasava and murdered her. He was tried and sentenced to transportation for life. The matter to be determined in this case is who, in these circumstances—the Hindu woman's estate of Chanbasava having been brought to an end—is to succeed as heir to Parappa's property.

The defendants, Kenchava and Gangava, the daughters of Parappa's uncle, obtained possession. Thereupon, the plaintiff, as son of Parappa's aunt, sued claiming to have a better title. The defendants being in possession—while averring their better title—also rely as they are entitled to do, upon the contention that the real title is in or through the murderer Hanmappa.

The case therefore raises three questions—

Can the murderer succeed ?

If not, can title be claimed through him ?

If not,—and he is to be wiped out altogether—who are the heirs of Parappa ?

P. C.

Sanyellappa Hosmani v. Channappa Somasagar.

Lord Phillimore.

And to this last question there are three possible answers: The three cousins may be entitled equally or the daughters of the uncle may succeed alone; or the son of the aunt may succeed alone.

As to the first two questions the Subordinate Judge held that the matter was provided for by Hindu Law, and that this law disqualified a murderer from succeeding to an estate, the succession to which he had accelerated by killing the woman who had a previous interest during her life. But in compliance as he considered with a decision of the High Court of Madras, he held that nevertheless the murderer did take the legal estate, though he was disqualified from having any beneficial interest. He further held that this disqualification was not confined to a personal disqualification of the murderer, but wiped him out from the line of descent, so that the heirship to the propositus Parappa is to be traced directly and not through him.

The High Court came to the same conclusions, that is to say that the murderer had no title, and that the heirship was not to be traced through him, but on a somewhat different line of reasoning. The learned Judges thought that there was no Hindu Law which governed the matter, so that they had to have recourse in obedience to the Bombay Regulation of 1827, No. 4, S. 26, to the principles of equity, justice and good conscience. And while thinking it immaterial whether the murderer had the legal estate vested in him or not because "in either case he must for the purpose of the inheritance be treated as if he were dead when the inheritance opened and as not being a fresh stock of descent," they thought it "simpler to say that the exclusion extends to the legal as well as beneficial estate."

Before this Board, it has been contended that the matter is governed by Hindu Law, and that the Hindu Law makes no provision disqualifying a murderer from succeeding to the estate of his victim and therefore it must be taken that according to this law he can succeed, and he being alive, the plaintiff has no title.

Their Lordships do not take this view. There is much to be said for the argument of the Subordinate Judge that the principles of jurisprudence which can be traced in Hindu Law, would warrant an inference that according to that law a man

P. C.

Sanyellappa Hosmani v. Channappa Somasagar.

Lord Phillimore.

cannot take advantage of his own wrong, and that if this case had come under consideration by the Hindu sages they would have determined it against the murderer. But it is unnecessary so to decide, because the alternative is between the Hindu Law being as above stated or being for this purpose non-existent, and in this latter case the High Court have rightly decided that the principles of equity, justice and good conscience exclude the murderer.

The English law on this subject is based upon principle and is well settled. It is true that the reported decisions have been in cases where the murderer was a devisee or legatee under the will of the murdered person, and that Joyce, J. in *Re Houghton* (2) thought it a matter for consideration whether the same rule would apply in the case of an intestacy, and cited a decision of a Court in the U. S. A. by which it was held that the provisions of the Statute of Distributions were paramount and forbade the consideration of any disqualification. But the actual decision of Joyce J. was rested upon another ground and a quite satisfactory one; and their Lordships are unable to follow the reasoning of the learned American Judge. Statutes regulating heirship or descent, or giving force to wills and to the devises contained in wills should be read as not intended to affect paramount questions of public policy or depart from well-settled principles of jurisprudence.

In their Lordships' view it was rightly held by the two Courts below that the murderer was disqualified; and with regard to the question whether he is disqualified wholly or only as to the beneficial interest which the Subordinate Judge discussed, founding upon the distinction between the beneficial and legal estate which was made by the Subordinate Judge and by the High Court of Madras in the case of *Vedanayaga Mudaliar* v. *Vedammal* (1), their Lordships reject, as did the High Court here, any such distinction. The theory of legal and equitable estates is no part of Hindu law and should not be introduced into discussion.

The second question to be decided is whether title can be claimed through the murderer. If this were so, the defendants as the murderer's sisters, would take precedence of the plaintiff, his cousin. In this matter also, their Lordships are of opinion that the Courts below were right. The murderer

1. (1904) I L R 27 M 591 14 M L J 297.
2. (1915) 2 Ch 173.

P. C.

Sanvellappa Hosmani v. Channappa Somasagar.

Lord Phillimore.

should be treated as non-existent and not as one who forms the stock for a fresh line of descent. It may be pointed out that this view was also taken in the Madras case just cited.

It was contended that a different ruling was to be extracted from the decision of the Bombay High Court in *Gangu* v. *Chandrabhagabai* (3). This is not so. In that case, the wife of a murderer was held entitled to succeed to the estate of the murdered man; but that was not because the wife deduced title through her husband, but because of the principle of Hindu family law that a wife becomes a member of her husband's gotra, an actual relation of her husband's relations in her own right, as it is called in Hindu law a gotraja-sapinda. The decision therefore has no bearing on the present case.

It remains to be determined whether as between the appellants and the respondent—all three being first cousins of the propositus—any distinction is to be made by reason of their sex or the sex of their parents. The Subordinate Judge thought that there was no distinction to be made between bandhus of equal nearness, and that all took equally, and so he gave to the plaintiff a third of the property.

Both parties appealed to the High Court, which held that as between bandhus of equal nearness to the propositus, male members of the family were preferred to female, and gave judgment that the plaintiff should take the whole.

The case against this decision has been very fully argued before their Lordships by counsel for the defendants—appellants. He brought a number of authorities before their Lordships for review, all of which have been considered.

In the result, however, for the purposes of this case, the matter can be brought into a short compass. Both the Subordinate Judge and the High Court agreed—indeed the Subordinate Judge said it was conceded in argument on both sides —that the plaintiff and the defendants are bandhus (bhinna gotra sapindas) of an equal degree being sapindas within four degrees of the common ancestor. This being so, no reason is shown in their Lordships' opinion why the defendants as daughters of the deceased father's brother should take in preference to the plaintiff who is the son of the deceased father's sister. So far again, both Courts are in agreement,

3. (1907) I L R 32 Bom 275.

P. C

Sinyellappa Hosmani v. Channappa Somasagar.

Lord Phillimore.

and their Lordships are in agreement with both Courts. That leaves to be determined the point on which the two Courts differ, the Subordinate Judge having held that all three should share alike, and the High Court having given preference to the plaintiff as being a male.

Now it was decided by the High Court of Madras in 1889, in the case of *Narasimma* v. *Mangammal* (4) that a father's sister was postponed to a mother's brother by reason of the general preference given among bandhus to male over female heirs. This decision was quoted without disapproval by their Lordships on this Board in the case of *Vedachala Mudaliar* v. *Subramania Mudaliar* (5).

But the High Court of Bombay in 1902 in the case of *Saguna* v. *Sadashiv* (6) came to the conclusion that however this might be in Madras it was different in Bombay. The Judges gave preference to the father's half-sister over the mother's brother, and did not follow the case of *Narasimma* v. *Mangammal* (4) which was quoted to them. And it was upon this decision of the High Court of Bombay that the main argument of counsel for the appellants was founded.

When analysed, however, the decision of the Bombay Court comes to this only. There may or may not be a preference among bandhus of males over females, if they are otherwise in the same position, but there is a prior and paramount enquiry whether they are bandhus on the father's side or on the mother's side—those on the father's side having the precedence.

The question of priority as between atma bandhus *ex parte paterna* and those *ex parte materna* has been the subject of much discussion—the latest word on the subject being found in *Vedachala Mudaliar* v. *Subramania Mudaliar* (5) which decided in 1921, that as between pitru bandhus and matru bandhus, the preference given to the former is settled.

The case now before their Lordships is not affected however by these considerations, as both sets of claimants are related on the father's side.

In 1908, the High Court of Madras in *Rajah Venkata Narasimha* v. *Rajah Surenani* (7) again decided that in that

4. (1889) I L R 13 M 10.

5. (1921) 48 I A 360 : 41 M L J 676. 6. (1902) I L R 26 Bom 710.

7. (1908) I L R 31 M 321.

P. C.

Sanyellappa Hosmani v. Channappa Somasagar.

Lord Phillimore.

Presidency a male bandhu is entitled to preference over a female bandhu, even though the latter is nearer in degree. *Saguna* v. *Sadashiv* (6) was not referred to in the judgment, but it was unnecessary because there was no contest between maternal and paternal bandhus.

Then in *Balkrishna* v. *Ramkrishna* (8) (decided in 1920 by the High Court of Bombay—consisting of the same Judges who decided the case now under appeal) the authority of *Rajah Venkata Narasimha* v. *Rajah Surenani* (7) was followed. The principle that among bandhus the male is entitled to preference over the female—even though the latter is nearer in degree—was accepted as being law for the Bombay Presidency as much as for the Madras Presidency and preference was given to a mother's sister's son over a brother's daughter. In that particular case the actual decision would appear to conflict with *Saguna* v. *Sadashiv* (6), because it apparently ignored the supposed prior and paramount claim of paternal over maternal bandhus ; and it would seem that for some unaccountable reason, *Saguna* v. *Sadashiv* (6) was not cited to the Court. Whenever therefore the two conflicting principles of preference of the paternal over the maternal line and preference of the male over the female sex, in the Presidency of Bombay, have to be weighed, the Court which weighs them will have to choose between these two decisions of the High Court.

But it will be seen from this summary that there is no case in the Bombay Presidency which decides that some preference is not to be given to male bandhus over female. And there is no doubt, indeed the learned counsel for the appellants did not contend that there was any doubt, that throughout the rest of India, preference for the male would be certain.

This being so, their Lordships are of opinion that the case was rightly decided by the High Court of Bombay, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellants *T L. Wilson and Co.*

A. de M. *Appeal dismissed.*

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6. (1902) I L R 26 Bom 710.
7. (1908) I L R 31 M 321.
8. (1920) I L R 45 Bom 353.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

Krishnamachariar *Petitioner** (*Counter-petitioner*)

v.

Sri Rengammal and two others. .*Respondents* (*Petitioners*).

F. B

Krishnamachariar *v.* Rengammal.

Limitation Act, S. 5—Rule framed by the Madras High Court—Extension to applications under O. 9, R. 13, Civil Procedure Code—Rule if ultra vires—*"By any enactment or rule"—Change in language by Act X of 1922—Effect.*

The rule framed by the Madras High Court in 1916 under its rule-making powers extending S. 5 of the Limitation Act to applications under O. 9, R. 13, Civil Procedure Code, is perfectly *intra vires*. *Sennimalai Goundan* v. *Palani Goundan*, (1915) 32 I C 975 followed.

S. 5 itself contemplates its extension by means of rules; and the alteration of the words "by any enactment or rule" into "by or under any enactment" by Act X of 1922 has not made any change in the law, but expresses it better.

Per Ramesam, J. :—The effect of the amendment by Act X of 1922 can only be, if at all, that no such rule can be made hereafter, but it cannot repeal a rule made in 1916.

Per Wallace, J. .—The matter is one of procedure and S. 122, Civil Procedure Code, gives the High Court power to make the rule.

Petition under Ss. 115 of Act V of 1908, and 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Koilpatti in I. A. No. 15 of 1922 in O. S. No. 296 of 1921, dated 14th February, 1922.

K. S. Ramabhadra Aiyar for petitioner.

A. Swaminatha Aiyar for respondents.

The Court (Krishnan and Waller, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Krishnan, J.

Krishnan, J. :—The chief question argued in this case is whether the rule framed by this High Court as an addition to R. 13, O. 9 of the Civil Procedure Code, by which the provisions of S. 5 of the Limitation Act were made applicable to applications to set aside *ex parte* decrees is *ultra vires* or not. The petitioner contends that it is and that the lower Court had

*C R P No. 633 of 1922. 11th April, 1924.

F. B.

Krishnamachariar v. Rengammal.

Krishnan, J.

no jurisdiction to excuse the delay in this case and should have dismissed the application as barred by limitation. The defendants who applied to set aside the *ex parte* decree against them had all of them been duly served and under Art. 164 of the Limitation Act the period of limitation for setting aside the decree is 30 days from the date of the decree. The application in this case was made beyond time and if delay cannot be excused the petition should have been dismissed. The Limitation Act does not by itself make S. 5 thereof applicable to applications of this sort and but for the rule framed by the High Court, the Court would have no power to set aside the decree. The question whether the rule is *ultra vires* or not, thus necessarily arises. If the rule is *intra vires* there is no ground for interfering with the lower Court's order on the merits under this Court's revisional jurisdiction. I am not prepared to say that the lower Court exercised its discretion in excusing delay and setting aside the *ex parte* decree in any illegal or improper manner if it had jurisdiction to do so.

The question of the validity of the rule has, therefore, to be considered in this case. It was framed by this Court under the power given to it by Ss. 122 and 128, Civil Procedure Code. The rule necessarily alters the period of limitation for applications under O. 9, R. 13, Civil Procedure Code, fixed by the Limitation Act. Do our rule-making powers extend far enough to enable us to frame a rule which has that effect ? I am inclined to think they do not. S. 122 gives us power to frame rules " regulating our own procedure and the procedure of the Civil Courts subject to our superintendence " and no more. If the rule framed falls within that category we can no doubt annul, alter or add to any rule in the first schedule of the Civil Procedure Code. S. 128 reiterates that the rule should refer to procedure of Civil Courts and adds one further restriction that the rule framed should not be inconsistent with the provisions in the body of the Code. It then gives examples of the sort of rules that may be framed. But there is no indication here that we could frame a rule to alter the limitation fixed for any application by the Limitation Act.

The question whether the rule in dispute is *ultra vires* or not was once raised before Coutts-Trotter, J., sitting as a single Judge and he held that it was not (see *Sennimalai Goundan* v. *Palani Goundan* (1). He held the view that " The arti-

1. (1915) 32 I C 975.

cles in the Limitation Act limiting applications of this nature which are almost entirely interlocutory deal clearly with matters of procedure." With all respect to the learned Judge, I feel considerable difficulty in accepting his view. I do not see how we can distinguish between the limitation for suits and the limitation for applications. If one is procedure the other must equally be procedure. I think neither of them can properly be brought under the term 'procedure.' The first schedule of the Civil Procedure Code deals with numerous kinds of applications. If we can alter the limitation for one it will follow that we have the power to alter the limitation with regard to every one of them. Can we then for example pass a rule to alter the limitation for execution applications ? It seems going too far to answer the question in the affirmative.

A Full Bench of the Allahabad High Court unanimously held the view that limitation could not be so affected: the learned Judges say in *Narsingh Sahai* v. *Sheo Prasad* (2) "We are unanimous in holding that this Court has no power by any rule that it may make to alter the period of limitation prescribed by the Indian Limitation Act." This view has been followed in the Lahore High Court by Mr. Justice Raoof in the case, *Madan Gopal* v. *Malawa Ram* (3). He observes "the Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to S. 122 of the Code ; but it has no power to alter the period of limitation provided by the Limitation Act," see page 778. It was held by the Bombay High Court under the corresponding S. 652 of the old Civil Procedure Code which gave power to the High Court, like the present S. 122, to make rules to regulate matters connected with its own procedure and the procedure of Civil Courts subject to its superintendence, that the High Court had no power to frame a rule modifying expressly or by necessary implication any rule of limitation prescribed by the Limitation Act [see *Chunilal Jethabhai* v. *Dahyabhai Amulakh* (4).]

Our attention was drawn by the respondents' vakil to O. 22, R. 9, clause (3) of the Civil Procedure Code, where there is an express provision made by the legislature itself that S. 5 of the Limitation Act shall apply to applications under sub-rule (2) of that rule and it was argued that this was an in-

2. (1917) I L R 40 All 1 on p. 7. 3. (1922) 68 I C 777.
4. (1907) I L R 32 Bom 14 at pp. 24—5.

F. B.

Krishnamachariar v. Rengammal.

Krishnan, J.

dication that the legislature considered the application of S. 5 to any of the applications dealt with in the first schedule as merely a matter of procedure and that the High Court has therefore power to frame similar rules under S. 122, Civil Procedure Code. On the other hand, it was urged that the legislature itself added the provision as it could not be done by any rule framed by the High Court. Neither argument seems to me to be sound and I think no inference can be drawn from it one way or the other.

Our attention was also drawn to the words of section 5 of the Limitation Act as they stood at the time the rule in question here was framed. It contemplated the section being made applicable " by any enactment or rule for the time being in force." But in my opinion this has no bearing on the question whether the rule making it so applicable is a valid rule or not. That has to be decided with reference to the scope of the rule-making power. It may be observed that S. 5 has been recently amended by Act X of 1922 whereby the words " by any enactment or rule " have been changed into " by or under any enactment " the word rule being taken away. There was some discussion about the effect of this alteration and the reason for it, but I think it has no bearing on the present case.

For the above reasons I am inclined to think that the rule in question in *ultra vires*. But as my learned brother takes a different view and as the question is of some importance as it refers to the scope of our rule-making powers and as he desires that the question should be referred to a Full Bench, I agree to that course.

We refer to the Full Bench the following question :—

" Is the rule framed by the High Court applying S. 5 of the Limitation Act to applications under O. 9, R. 13 of the Civil Procedure Code *intra vires* or not ?"

Waller, J.

Waller, J.—I regret that I cannot agree. S. 5 of the Limitation Act may be made applicable by rule to any application. Such a rule has been passed under S. 122, Civil Procedure Code. I am not prepared to dissent from Coutts-Trotter, J.'s view that this is a matter of procedure and that the High Court had power to frame such a rule under S. 122, Civil Procedure Code. I agree with him that the articles in the Limitation Act limiting applications of this kind deal with matters of procedure. The rulings quoted seem to me to be not precise-

ly in point. All that they decided was that the time requisite for getting certain copies, excluded by S. 12 of the Limitation Act, could not be enlarged by implication in consequence of a rule having been passed insisting on a further copy being produced. What one Court held was that the rule was valid enough, but had no effect on S. 12. That is not the point here. There is no question here of altering expressly or by implication a period of limitation. It is a question of applying by rule a section of the Limitation Act which itself provides for such application. R. 9 (3) of O. 22, Civil Procedure Code, indicates, to my mind, that the legislature regarded the matter as being one of procedure. I am not prepared to infer from the fact that the legislature itself inserted sub-rule (3), that the High Court has no power to insert a similar rule elsewhere in Schedule I. I would, therefore, hold that the rule in question is *intra vires*. In any case, it has been in force and followed for a number of years. Its validity seems to have been unchallenged since 1915 [vide *Sudalaimuthu Kudumban* v. *Andi Reddiar* (5)] and I think that the best course, now that the question has been raised and we are differing on it, is to refer it for the decision of a Full Bench. I, therefore, agree that the question framed by my learned brother be so referred.

K. S. Ramabhadra Aiyar for petitioner.

A. Swaminatha Aiyar for respondents.

The Court expressed the following

OPINION :—*The Chief Justice* :—By a rule framed by this Court in 1914 as an addition to R. 13, O. 9 of the Civil Procedure Code the provisions of S. 5 of the Limitation Act were made applicable to applications to set aside *ex parte* decrees. It is suggested that that rule is *ultra vires* of the rule-making powers vested in this Court. I now propose to say very little about it, because I have already expressed my opinion on this matter in *Sennimalai Goundan* v. *Palani Goundan* (1), and nothing that I have heard in the course of an extended argument induces me to think that that opinion was wrong. I think the strongest ground on which the rule can be supported is this : that S. 5 of the Limitation Act obviously contemplates its extension by means of rules. In its old form it used the word " rule " and the section may be made applicable " by any enactment or rule. " The words have been changed as fol-

Coutts Trotter, C. J

1. (1915) 32 I C 975.
5. (1922) I L R 45 M 628 42 M L J 484.

F. B.
Krishnamachariar v. Rengammal.
Coutts Trotter, C. J.

lows instead of "by any enactment or rule, the section now runs "by or under any enactment." These words though they mean the same thing obviously express it better. In my opinion, it is perfectly clear that the High Court had power under the combined effect of S. 5 of the Limitation Act and S. 122 of the Civil Procedure Code to apply the provisions of S. 5 which after all are a relaxation of the rigour of the law to a matter so eminently suitable to such an extension as to set aside *ex parte* decrees. I agree with my brother, Waller, J. and the answer to the question referred to us, is, that the rule framed by the High Court is *intra vires*.

Ramesam, J.

Ramesam, J.—I agree with the judgment delivered by my Lord as to the construction of the words 'by or under any enactment' in S. 5 of the Limitation Act. So far as S. 5 is concerned the section itself contains an indication that it may be so extended by any other enactment or by any other rule made under any enactment. But even assuming that the contention of the learned vakil for the appellant as to the effect of the amendment is correct, namely, that the High Court cannot by any rule in the Civil Procedure Code extend S. 5 of the Limitation Act the effect of the amendment which was made in 1922 can be that only after 1922 the High Court cannot make such alterations or additions. It cannot be contended that an amendment of 1922 repealed the rule made in 1916. All that can be said is that no such rule can be made hereafter but as I have said already I do not agree with the contention of the learned vakil as to the effect of the words 'by or under any enactment.'

Wallace, J.

Wallace, J.—I agree with what both my learned brothers have said, but I would like to add one or two sentences. The appearance of a similar rule in O. 22, R. 9, would indicate that such a provision of limitation was deliberately placed by the legislature in the first schedule of the Civil Procedure Code and therefore alterable as a matter of procedure by force of S. 122. S. 122, as I read it, gives power to annul this provision in O. 22, R. 9, and therefore would, if that provision were not found in O. 22, R. 9, give powers to insert such a provision in that O. 22 if advisable. If such a power can be legally exercised in case of O. 22, R. 9, I cannot see any possible reason why it should not be exercised in the case of O. 9, R. 13.

T. S. V. *Reference answered.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

Govinda Naidu and others ... *Appellants** (*Plaintiffs*)

v.

Chengalroya Mudali and others ... *Respondents* (*Defdts.*).

F. B.
Govinda Naidu
v.
Chengalroya Mudali.

Madras Estates Land Act, Ss. 8 (4), 153, 157 *and* 189—*Landholder purchasing kudivaram interest in holding—Ejectment of non-occupancy ryot under time—Expired lease for one year—Jurisdiction of Civil Court—Benamidar—Right to sue in ejectment.*

Held, by the Full Bench S. 153 of the Madras Estates Land Act is only exhaustive of the grounds on which a suit to eject a non-occupancy ryot can be filed before the Collector. The section does not prohibit the ejectment of a non-occupancy ryot on grounds other than those specified therein and a suit for ejectment based on such other grounds can be maintained in the Civil Court.

Observations of Spencer, J., in *Ponnusami Padayachi* v. *Karuppudayan,* (1914) 26 M L J 285 approved.

Yelikapalli Venkayya v. *Venkatasamayya Appa Rao,* (1917) 33 M L J 757; and observations of Oldfield, J. in *Sankara Venkataratnam* v. *Sri Rajah Varadarajah Appa Rao,* (1915) 29 M L J 184 overruled.

Per Phillips and Venkatasubba Rao, JJ. :—It is open to a benamidar-vendee having no beneficial interest in the property sold, to sue for the ejectment of a tenant on the expiry of his lease. *Gur Narayan* v. *Sheolal Singh,* (1918) 46 C 566 36 M L J 68 (P C) referred to.

Appeal against the decree of the District Court of Chingleput in O. S. No. 71 of 1918.

M. Patanjali Sastri for *A. Krishnaswami Aiyar* and *A. N Krishna Aiyangar* for appellants.

V C. Gopalaratnam for *V V Srinivasa Aiyangar* for respondents.

The Court (Phillips and Venkatasubba Rao, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Phillips, J.

Phillips, J. :—One Chengama Naidu, Zamindar, was the original owner of the plaint lands. In 1870 he purchased also the kudivaram right. The plaintiffs purchased from his suc-

*Appeal No. 7 of 1921, 7th, 9th and 24th April, 1924.

F. B
Govinda Naidu v. Chengalroya Mudali.
Phillips, J.

cessor in title in 1917. The suit is brought to eject the defendants from the suit lands, the defendants having executed muchilikas for periods of one year only, undertaking to give up the lands at the expiry of the period.

The District Judge held that the plaintiffs were mere benamidars and that the sale to them was a sham transaction and consequently they were not entitled to maintain the suit. The recent decision of the Privy Council in *Gur Narayan* v. *Sheolal Singh* (1) appears to be against this view, for it was there held that a benamidar could bring a suit although he was not the real owner. The respondents' vakil contends that that decision applies only to cases where a transaction is supported by consideration and that it does not apply to the transfer of property by the owner to a benamidar which was not really intended to effect a transfer. From the judgment, however, it would appear that the Privy Council made no distinction between the two classes of benamidars, for they start the discussion with the following words :—" On the question whether a person who has no beneficial interest in the property which stands in his name or is acquired in his name can maintain an action in respect thereof, there is considerable diversity of judicial opinion in India," and further on in the judgment they refer to a passage in *Bilas Kunwar* v. *Desraj Ranjit Singh* (2) and from these two sentences I think it is clear that both classes of benamidars are included in that decision, and the plaintiffs are, therefore, entitled to sue in their own name whether or not they are mere benamidars. The cases relied on by respondents were decided prior to this ruling of the Privy Council. [57 I. C. 689 (1914) M. W. N. 717 : 9 L. W. 22.]

The case as regards the lands is not quite the same in respect of all of them, for the District Judge has found that in respect of 3 1|2 kanis the defendants had occupancy rights. Admittedly they have been in possession of these lands for a very long period and are still in possession, and the only evidence that they have been out of possession for any time is the evidence afforded by a muchilika, Ex. D, which was executed by other persons in respect of these lands. This is the only muchilika that has been issued and as admittedly the plaintiffs' vendors were in possession of annual muchilikas it is very significant that they have not been produced. There seems, there-

1. (1918) I L R 46 C 566 36 M L J 68 (P C).
2. (1915) I L R 37 All 557.

F. B.

Govinda Naidu v. Chengalroya Mudali.

Phillips, J

fore, to be no reason to disturb the finding of the District Judge that in respect of these 3 1|2 kanis the defendants have acquired occupancy rights, and consequently the suit must fail as regards those lands.

As regards the other portion of the plaint lands, there has been no such occupation by the defendants and the plaintiffs rely on the provisions of S. 8, clause (4) of the Estates Land Act as justifying their suit. That section reads as follows "In cases where the interest of the ryot in the holding has passed to the landholder by transfer for valuable consideration before the passing of this Act otherwise than at a sale for arrears of rent, or has passed by inheritance, the landholder shall have the right for a period of twelve years from the passing of this Act of admitting any person to the possession of such land on such terms as may be agreed upon between them and the person so admitted shall not be entitled during such period to the benefit of the provisions of S. 46." The District Judge has, however, held that the defendants are non-occupancy ryots and that consequently the provisions of S. 153 must be applied, and there being no provision for the ejectment of ryots holding on a lease for one year, the plaintiffs have no cause of action. S. 153 has been the subject of considerable judicial discussion in this Court, but in no reported case does it appear to have been considered in connection with S. 8, clause (4) of the Act, the prior cases dealing with occupancy of " old waste " as defined in the Act. There is, therefore, no direct authority so far as the facts of this case are concerned, and I will now proceed to deal with it in that view.

In the first place, there is considerable doubt as to whether the defendants are really non-occupancy ryots for although in the Lower Court the plaintiffs' pleader admitted that they were such, that admission, if not supported by law, cannot bind the parties, and the question has to be determined. The definition of " ryot " in S. 3, is " a person who holds for the purpose of agriculture ryoti land in an estate *on condition of paying* to the landholder the rent which is legally due upon it. " Undoubtedly, during the period of the 1st defendant's lease he was such a ryot and it is contended that by mere holding over, he continues to be such. Admittedly no rent has been received from him for his occupation and, therefore, it is difficult to understand how he can be said to hold the land on condition of paying to the landholder the rent. He is holding the land

F. B.

Govinda Naidu v. Chengalroya Mudali.

Phillips, J.

in contravention of the terms of his lease and his agreement to pay rent has already expired. In the lease there is no condition that he shall pay rent after the expiry of the period, and there is nothing in the Act which lays down that a man holding ryoti land without an agreement to pay rent holds it on condition of paying the rent. No doubt there is an observation in *Yelikapalli Venkayya* v. *Venkataramayya Appa Rao* (3) that "the mere fact that a lease under which a man occupies ryoti land, has expired, does not, as we read that section, viz., S. 163, make him a trespasser within the meaning of that section." Under S. 163 "any person who otherwise than by inheritance or legal transfer occupies ryoti land in an estate and has not been admitted as a ryot by the landholder shall be liable to ejectment as a trespasser." The defendants were certainly admitted as ryots by the grant of the lease, but they were so admitted for a definite term and I do not think it can be held that if they continued to occupy the land, that occupation can be deemed to be a consequence of their admission as ryots, for it is rather the result of the breach of the terms upon which they were so admitted. The occupation is certainly not by legal transfer, for that transfer was only operative until the end of the lease. If defendants are not ryots within the meaning of the Act, they cannot be non-occupancy ryots, a term which is nowhere specifically defined, and S. 153 need not be applied at all and the suit would be brought under S. 163 in a Civil Court as therein provided or under the ordinary provisions of law. This view is in effect supported by Tyabji, J., in his judgment in *Sankara Venkataratnam* v. *Sri Rajah Varadarajah Appa Rao* (4); but as I have pointed out above, it is opposed to the decision of the Bench in *Yelikapalli Venkayya* v. *Venkataramayya Appa Rao* (3) and also to the opinion of Oldfield, J., in the former case.

If the defendants are not trespassers and are treated as non-occupancy ryots, then S. 153 has to be considered. S. 189 and Sch. A of the Act take away from the cognizance of Civil Courts all suits filed under S. 153 and that section is the one dealing with eviction of non-occupancy ryots. It would appear from the judgment in *Yelikapalli Venkayya* v. *Venkataramayya Appa Rao* (3) that the Bench in that case treated S. 153 as exhaustive and held that all suits to eject non-occupancy ryots

3. (1917) 33 M L J 757.
4. (1915) 29 M L J 184.

F. B.

Govinda Naidu v. Chengalroya Mudali.

Phillips, J.

must be brought in the Revenue Court. However, in the earliest reported case to which we have been referred, *Ponnusami Padayachi* v. *Karuppudayan* (5), Spencer, J., held that the section was not exhaustive, but Miller, J., who was the other member of the Bench did not deal with this question. In the other case *Sankara Venkataratnam* v. *Sri Rajah Varadarajah Appa Rao* (4), Tyabji, J., also held that some suits in ejectment could be brought in a Civil Court, although he had expressed a different opinion in an earlier case, *Ardajeri Rama Reddi* v. *Karpi Sivaga* (6). It is, however, significant that Oldfield, J., in a subsequent case, *President, District Board, Tanjore* v. *Kannuswami Thondaman* (7) agreed with the view taken by Spencer, J., that the section was not exhaustive. We thus have two Judges who, after due consideration, have come to the ultimate conclusion that the section is not exhaustive and also the opinion of Spencer, J., to the same effect. The cases referred to, as I have mentioned above, all deal with the occupation of old waste under S. 6 of the Act and made no reference to S. 8 (4) with which we are now concerned, and it is this fact which differentiates the present case.

Under S. 8 (4) the landholder is empowered within 12 years of the passing of the Act to lease out the ryoti land in which the interest of the ryot has passed to him on such terms as may be agreed upon between them and there is a further proviso that the person so admitted shall not be entitled during such period to the benefit of the provisions of S. 46. S. 46 is a section dealing with the right of a non-occupancy ryot to acquire a permanent right of occupancy under certain conditions. That right is expressly taken away from persons to whom land has been leased under S. 8 (4). If this section stood alone it would be quite clear that the landholder would have the right to evict his tenant in accordance with the terms of the lease to that effect ; but it is contended that this right has been taken away by S. 153 and if S. 153 is exhaustive that possibly would be the case. But it must be remembered that S. 153 is expressly stated to be subject to the other provisions of this Act and consequently it is subject to the provisions of S. 8 (4). Unless, therefore, S. 153 expressly takes away

5. (1914) 26 M L J 285.
4. (1915) 29 M L J 184.
6. (1913) M W N 971.
7. (1916) 35 I C 121.

F. B.

Govinda Naidu v. Chengalroya Mudali.

Phillips, J.

the rights conferred by S. 8 (4), it would not be right, I think, to read into it any such provision ; for when a right has been expressly conferred by a statute, there can be no implication that it is taken away by another portion of the statute unless it is expressly so done. The reason for treating S. 153 as exhaustive appears to be based on the language of the proviso to the section which was added in an amending Act, namely, " nothing in this shall affect the liability of any person who is a non-occupancy ryot, etc., to be ejected." This provision has been construed in one way by Spencer and Tyabji, JJ., and in another way by Oldfield, J., in *Sankara Venkataratnam* v. *Sri Rajah Varadarajah Appa Rao* (4), and the Bench in *Yelikapalli Venkayya* v. *Venkataramayya Appa Rao* (3), and it is for consideration, which is the right interpretation. The section begins " A non-occupancy ryot shall, subject to the provisions of this Act, be liable to ejectment by suit before the Collector on one or more of the following grounds, and not otherwise." The real question is the meaning of the words " not otherwise." Does it refer back merely to the words " one or more of the following grounds," or does it also include the words " by suit before the Collector " ? If it refers to the latter, then undoubtedly a non-occupancy ryot would not be liable to ejectment except by suit before the Collector unless there is some provision in the Act which allows of it. The anomaly of this interpretation is clearly set out both in the judgments of Spencer and Tyabji, JJ., and it certainly is somewhat strange that the legislature should favour those tenants who hold on a short lease rather than those who hold on a lease for a period exceeding five years, which is referred to in cl. (*e*) of the section. The proviso according to the respondents merely adds another class of cases to clauses (*a*) to (*e*) and the words " the liability of any person to be ejected " do not touch the question of the *forum* in which the liability is to be enforced. If the legislature had intended to merely enact a sixth class of case in which ejectment could be had, it is difficult to understand why the proviso was framed in its present form when it would have been simpler to have merely added a clause (*f*)—" on the ground of expiry of the lease granted before the commencement of this Act." The form in which the amendment has been made leads me to accept the

3. (1917) 33 M L J 757.

4. (1915) 29 M L J 184.

F. B.

Govinda Naidu v. Chengalroya Mudali.

Phillips, J.

appellant's contention that the liability referred to is the liability of a tenant under the ordinary law apart from the provisions of the Estates Land Act. A tenant, who has accepted a lease for one year, is bound under the Transfer of Property Act to deliver possession to his landlord at the expiry of the term and he is then liable to ejectment in default. It is possible that, because the proviso is confined to leases granted before the commencement of the Act, this may have been the intention of the legislature and that his liability is only the liability under the Act. It is certainly a question of great difficulty and the section has been interpreted in different ways. If " otherwise " is read as referring only to the grounds mentioned in the section, then there would be no difficulty in holding that any person liable to ejectment under the ordinary law would not be saved therefrom unless it is expressly so stated in the Estates Land Act and I think that probably this interpretation of the section would lead to less difficulty in dealing with all these cases. I certainly think that the words in S. 153 " subject to the provisions of this Act " must be interpreted as subject to S. 8 (4) and that the rights and liabilities under S. 8 (4) are not touched by S. 153. Another ground for this view is that it is well established that the jurisdiction of Civil Courts continues in all cases unless it is expressly taken away by the statute. As however there is a conflict of opinion in this Court both on the interpretation of S. 163 and also S. 153 and as my learned brother does not at present wish to express an opinion as to whether S. 163 should be applied to this case, I think it is necessary to have S. 153 interpreted by a Full Bench of this Court and would therefore refer the following question for determination :—

Is S. 153 of the Estates Land Act exhaustive, and does it oust the jurisdiction of Civil Courts in all cases where it is sought to eject a non-occupancy ryot ?

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—The facts have been set out and the authorities referred to in the judgment of my learned brother, and I do not propose to cover the same ground. But, I desire to say a few words on the interpretation of S. 153 of the Madras Estates Land Act.

It is admitted that the case falls within S. 8 (4) of the Act and under the terms of the lease which is for a period of one year, the landholder is entitled to take possession of the

F. B.

Govinda Naidu v. Chengalroya Mudali.

Venkatasubba Rao, J.

land on the expiry of that period. S. 8 (4) provides that the landholder shall have the right of admitting any person to the possession of the land described in that sub-section on such terms as may be agreed upon between them. It is argued on behalf of the defendants that the plaintiff is not entitled to eject them, because it is said that S. 153 applies and the liability to be ejected is limited to the grounds specified in it. It is further argued that the suit is cognizable under the terms of that section only by the Collector, and that Civil Courts have no jurisdiction to try suits instituted for purpose of ejecting non-occupancy ryots. S. 153 runs :—

" 153. A non-occupancy ryot shall, subject to the provisions of this Act, be liable to ejectment by suit before the Collector on one or more of the following grounds and not otherwise, namely :—

(*a*) On the ground that he has used the land in a manner which renders it unfit for the purposes of the tenancy.

(*b*) On the ground that a decree for arrears of rent in respect of the holding passed against him or any person whose legal representative he is remains unsatisfied at the expiry of the Revenue year following the one in which the decree was passed.

(*c*) On the ground that he has refused to agree to pay a fair and equitable rent determined under S. 49.

(*d*) On the ground that without the permission of the landholder the ryot has mined or quarried or excavated gravel or clay for profit within his holding ; and

(*e*) Where he has been admitted to occupation of the land under a registered lease for a term exceeding five years, on the ground that the term of the lease has expired.

(Nothing in this section shall affect the liability of any person who is a non-occupancy ryot according to the provisions of this Act to be ejected on the ground of expiry of the term of a lease granted before the commencement of this Act.)

In my opinion the section deals with the grounds on which a non-occupancy ryot may be ejected by means of a suit before the Collector. In that sense, the enumeration of the grounds appears to be exhaustive. If the lease is for a term exceeding five years and is in writing and registered, the lessee may be ejected on the ground that the term of the lease has expired.

This is what clause (*e*) provides. In the case of a lease not coming within clause (*e*), the lessee can be ejected only on one of the grounds mentioned in clauses (*a*) to (*d*) ; that is to say in the case of a lease, say for 2 or 3 years, the lessee can be ejected only on the ground that he has misused the land or that he has failed to pay the rent or that he has refused to pay a fair and equitable rent. It is only on these grounds in respect of a short term lease, to use a compendious expression, that a lessee can be ejected by a suit before the Collector. The object of the section seems to be to provide a summary remedy in certain cases. The legislature has thought it fit to give the Collector jurisdiction to eject tenants under leases coming within clause (*e*) on any one of the five grounds specified in that section. But if the tenant does not hold the land under a lease coming under clause (*e*) it seems to be the intention of the legislature to vest the Collector with jurisdiction to eject him only if one of the four grounds mentioned in clauses (*a*) to (*d*) exists. To take a concrete instance, if the tenant holds the land under a lease for a term of one year, he cannot be ejected under S. 153 on the ground that the term of the lease has expired. It is contended on behalf of the defendants that a tenant admitted under a lease, say, for a term of one year, cannot be ejected notwithstanding that the lease has become determined by efflux of the time limited under it. I agree that such a tenant cannot be ejected under section 153 of the Act. But I do not think that the rights possessed by the lessor under the general law are intended to be restricted by S. 153. The law confers certain rights upon the lessor and imposes certain liabilities on the lessee. For instance, one of the rights possessed by the lessor is that on the determination of the lease, the lessee shall put him into possession of the property leased. A lease of property may also be determined by forfeiture either because the lease contains an express provision for re-entry on breach of a particular condition or, because the lessee has denied the lessor's title to the property. If the legislature intended to abrogate the whole body of the law on the subject, I should certainly expect to find very clear words, and I do not think it is permissible to hold that sweeping changes in the law have been effected merely by drawing inferences from the language used. The results are of a far-reaching character and I am not prepared to assume that substantive rights have been taken

F. B.

Govinda Naidu v. Chengalroya Mudali.

Venkatasubba Rao, J.

away by the terms of section 153. The contention on behalf of the defendants is practically this A non-occupancy ryot under a short-term lease cannot be ejected at all unless he misuses the land or fails to pay rent or refuses to pay a fair rent. According to this argument, if a non-occupancy ryot is once admitted to the occupation of the land under a lease for a short term, the lessor is practically without a remedy ; S. 8 (4) gives the lessor the right to admit the lessee on such terms as may be agreed upon ; but yet the lessee, provided he is careful enough to pay the rent and not to misuse the land, acquires what may be roughly described as a permanent right to occupy the land. This position leads to many anomalies, one of them being that a tenant under a short-term lease enjoys an advantage over a tenant under a lease falling within clause (*e*), the former can never be ejected on the ground that the term of the lease has expired; whereas the latter is liable to be so ejected. It has been said that, the object of the legislature was to favour long leases and to discourage short leases. But to understand the principle underlying the section seems to me to be an impossible task. What therefore has to be done is to interpret the section reasonably and in a manner that absurd results do not follow. I would construe the section thus " A non-occupancy ryot shall be liable to be sued before the Collector only in certain cases and in no other cases ; only when the grounds specified in the section exist can the lessor eject his tenant by means of a suit before the Collector." The landlord, it is intended, may enforce the statutory right given by S. 153 by means of a suit before the Collector. But the existing rights under the general law are not intended to be taken away and the Civil Courts are not deprived of their jurisdiction.

The defendants rely upon the proviso to the section as supporting their contention. The proviso just like the body of the section is unhappily worded. But I think that the proviso adds a new ground of ejectment, namely, in case of leases granted before the commencement of the Act, the ryot may be ejected on the expiry of the term whether the lease is of the description mentioned in clause (*e*) or whether it is not. But here again, the lessor gets a statutory right to institute a summary suit before the Collector, and it is not intended that the proviso should affect the ordinary jurisdiction of the Civil Courts or take away the rights possessed under the general law.

F. B.

Govinda Naidu v. Chengalroya Mudali.

Venkatasubba Rao, J.

I place this construction because any inconsistency will be then avoided between the body of the section and the proviso.

The section is by no means easy to interpret. Whichever view may be adopted, it is difficult to justify it with reference to an intelligible principle underlying the section. But I think the construction that I have ventured to place upon the section is least open to objection. In my opinion when the term under a short-term lease expires, the lessee may be ejected under the general law whether he holds over that is, continues in possession with the consent of the landlord, or becomes a mere trespasser by continuing to be in possession without such consent. Cls. (*a*) to (*e*) of S. 153 do not apply at all and the rights and the liabilities of the parties are to be regulated entirely irrespective of the provisions of the Madras Estates Land Act.

In view of the conflict of opinion that have been expressed on this subject in the cases to which my learned brother has referred, I agree that the matter should be referred to a Full Bench ; and I also agree in the Order of Reference proposed.

I may add that the argument on behalf of the defendants that the plaintiff is not entitled to sue, because he is a benamidar for the true owner, is untenable and that I have nothing to add to the observations of my learned brother on this point with which I entirely agree.

A. Krishnaswami Aiyar and *A. N. Krishna Aiyangar* for appellants.

V C. Gopalaratnam for *V V Srinivasa Aiyangar* for respondent.

The Court expressed the following

OPINION :—*Ramesam, J.*—The facts are simple. The suit lands are ryoti lands in an estate as defined by the Madras Estates Land Act. Chengama Naidu, the landholder in 1870, purchased the kudivaram interest. In fasli 1318, the lands were let to the 1st defendant for cultivation for a year. Thereafter, the 1st defendant continued in possession under yearly leases also agreeing to relinquish possession of the lands at the end of the year. On 17th June, 1917 the plaintiffs purchased the lands and now seek to eject the 1st defendant. Ramesam, J.

The question referred to us is :—Is S. 153 of the Estates Land Act exhaustive, and does it oust the jurisdiction of Civil

F. B.

Govinda Naidu v. Chengalroya Mudali.

Ramesam, J.

Courts in all cases where it is sought to eject a non-occupancy ryot ?

For the purpose of discussing S. 153, I will at once assume (without deciding) that the defendant is a non-occupancy ryot. Phillips, J., gave some reasons for holding that he is not a ryot at all. There is considerable force in his observations. Assuming, however, that he is a non-occupancy ryot, we have the following classes of non-occupancy ryots under the Act:—

(1) A ryot of old waste [S. 6 (3)].

(2) A ryot of waste land reclaimed by the landlord for a period of thirty years for the reclamation [S. 6 (5).]

(3) A person admitted under S. 8 (4), the case before us.

There may be others.

S. 153 of the Act applies to all these cases. When the case is one of old waste, its effect has to be considered along with S. 157. A tenant of old waste can be ejected only on the grounds mentioned in S. 153, even if there is a contract to the contrary. But, in the other two cases of non-occupancy ryots, there is no section similar to S. 157. In these cases, a contract to the contrary will have full operation and the ryot is *prima facie* liable to be ejected on the expiry of the term. The words "not otherwise" in S. 153 are used in contrast to the words "on one or more of the following grounds," and have no reference to the words "before the Collector." The effect of the opening words of the section is—A suit before the Collector will lie only on certain grounds and on no other grounds. The section does not prohibit a suit before the Civil Court on other grounds if it lies. The only section in the Act cutting down the jurisdiction of Civil Courts is S. 189 and I do not think another prohibition of the jurisdiction of Civil Courts is intended in S. 153. If the words "not otherwise" mean not only "on no other grounds" but also "in no other Court" S. 157 is unnecessary as to old waste.

Of the decisions referred to by Phillips, J., in *Ardajeri Rama Reddi* v. *Karpi Sivaga* (6), *Ponnusami Padayachi* v. *Karuppudayan* (5), *Sankara Venkataratnam* v. *Sri Rajah Varadarajah Appa Rao* (4), *Yelikapalli Venkayya* v. *Venkataramayya Appa Rao* (3) and *President, District Board, Tanjore* v. *Kannusami Thondaman* (7), the decision of Tyabji, J., in

4. (1915) 29 M L J 184. 3. (1917) 33 M L J 757.
5. (1914) 26 M L J 285. 6. (1913) M W N 971. 7. (1916) 35 I C 121.

F. B.
Govinda Naidu v. Chengalroya Mudali.
Ramesam, J.

Ardajeri Rama Reddi v. *Karpi Sivaga* (6) has no bearing. In that case it was found that the land was neither private land nor old waste nor was there any suggestion that the ryot was a non-occupancy ryot. The defendant in it was a ryot to whom S. 6 (1) applied. The rest of the observations in that judgment are *obiter dicta*. No question arose about S. 153 and the case can throw no light on it. The other cases dealt with old waste. The observations of Spencer, J., in *Ponnusami Padayachi* v. *Karuppudayan* (5) about S. 153 support my view. The actual decision relates to the application of the proviso to the section. As to *Sankara Venkataratnam* v. *Sri Rajah Varadarajah Appa Rao* (4), I do not agree with the view of Oldfield, J., that " it prescribes the Collector's Court as the tribunal for all ejectment suits against them, whatever the ground of liability to ejectment." It follows I dissent from the decision in *Yelikapalli Venkayya* v. *Venkataramayya Appa Rao* (3), which is based on the view adopted by Oldfield, J., in *Sankara Venkataratnam* v. *Sri Rajah Varadarajah Appa Rao* (4). The decision in *President, District Board, Tanjore* v. *Kannuswami Thondaman* (7) turned on the application of Ss. 153 and 157 to old waste and cannot help in cases where the land held by the non-occupancy ryot is not old waste.

My answer to the question referred to is :—S. 153 is exhaustive of the grounds of the suit before the Collector but not exhaustive in the sense that the suits for ejectment of non-occupancy ryots lie only before the Collector. It may be that, as to old waste the effect of S. 157 is to prohibit a suit for ejectment on grounds other than those in S. 153 (which can be only before a Civil Court) though, even then, the proviso to S: 153 prevails over both the Ss. 153 and 157. But as to other non-occupancy ryots, there is no such section and suits lie before Civil Court if based on grounds other than those mentioned in S. 153. I agree with Venkatasubba Rao, J.'s observation that this is the only contention which reconciles and gives effect to S. 153, its proviso and S. 157. My view is the view indicated by both the learned Judges who referred the case.

Chief Justice.—I agree.

Wallace, J.—I agree.

A. V. V. *Reference answered.*

3. (1917) 33 M L J 757. 4. (1915) 29 M L J 184.
5. (1914) 26 M L J 285. 6. (1913) M W N 971. 7. (1916) 35 I C 121.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

P. S. Ramanathan Chettiar (deceased) and another *Appellants* in both*

v.

M. G. Mohideen Saheb *Respondent in both (Judgment-debtor).*

Ramanathan Chettiar *v.* Mohideen Saheb.

Civil Procedure Code, S. 48—Execution of decree—Evasion of arrest—Fraud—Limitation—Extension of time.

Where a judgment-debtor evades arrest in execution of the decree, he is guilty of fraud within the meaning of S. 48, Civil Procedure Code, and the period of limitation for execution is thereby extended.

Annamalai v. *Rangaswami* (1883) I. L. R. 6 M. 365 ; *Syed Muhamad Rowther* v. *Somasundaram Chettiar* (1920) 12 L. W. 710 followed.

Seshachalam Chetty v. *Rajam Chetty* (1898) 8 M. L. J. 203 not followed.

Appeals against the orders dated 6th September, 1921, of the City Civil Court, Madras, in C. M. P. No. 813 of 1921 in E. P. No. 152 of 1920 in O. S. No. 428 of 1907 and E. P. No. 152 of 1920 respectively.

A. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar and *V. Rajagopala Aiyar* for appellants.

S. Srinivasaraghavan and *V Thiagarajan* for respondents.

The Judgment of the Court was delivered by

Phillips, J.

PHILLIPS, *J.* :—In this case the appellant is decree-holder in O. S. No. 428 of 1907 in the Madras City Civil Court. He attempted to execute the decree on several occasions in 1911, 1914, 1917 and finally just as the decree was about to be barred by limitation, he filed the present petition E. P. No. 152 of 1920. In that he asked for the arrest of the judgment-debtor and also for the appointment of a Receiver in order to collect a debt due to the judgment-debtor. The arrest was ordered and apparently batta was paid for this arrest on five different occasions but on no occasion was the debtor found. Meanwhile an order had been made appointing a Receiver for the collection of the debt. After these many attempts at arrest had failed, the petition was rejected on the 29th of October, 1920 but it was restored to file on the

*A A O Nos. 47 and 48 of 1922. 28th February, 1924.

Ramanathan Chettiar v. Mohideen Saheb.

Phillips, J.

2nd of December, 1920 so far as the application for the appointment of Receiver was concerned, but the Judge refused to issue any further warrants for arrest. An appeal was made against that order but was dismissed by this Court on the ground that the appellant had other remedies. He finally obtained a certain sum of money by filing a suit against the judgment-debtor's debtor but only realised a sum of Rs. 754, the decree amount being over Rs. 4,000. He then put in another petition praying that the judgment-debtor might be arrested, C. M. P. No. 813 of 1921, but that petition was dismissed on the ground that it was a fresh application and not a continuation of the former application and was therefore barred as being more than twelve years from the date of the decree. An appeal has been filed against that order as well as against the final order dismissing the execution petition and it is urged that, firstly, C. M. P. No. 813 must be treated as a continuation of E. P. No. 152 and it is therefore in time and secondly, that it is in time by reason of the fraud of the judgment-debtor who has been evading arrest.

The first point is one of considerable difficulty and we have been referred to a number of decisions dealing with the point, but we think that it is unnecessary to determine it in these proceedings because the appellant must succeed on the second point. It has been held so far back as in *Annamalai* v. *Rangaswami* (1) that, when a judgment-debtor is able to pay and evades arrest in execution of the decree, he is guilty of fraud within the meaning of S. 48 or S. 230 as it then was, of the Civil Procedure Code. This was affirmed in *Syed Muhamad Rowther* v. *Somasundaram Chettiar* (2) and the only case to the contrary is *Seshachalam Chetty* v. *Rajam Chetty* (3) which was expressly dissented from in *Syed Muhamad Rowther* v. *Somasundaram Chettiar* (2). We agree with the view taken in *Syed Muhamad Rowther* v. *Somasundaram Chettiar* (2) that the evasion of arrest is fraud within the meaning of S. 48 and the question is whether there has been such an evasion in the present case. It must be conceded that in the lower Court this point was not specifically urged, for it is not dealt with at all in the judgment, but there is a ground taken in the Memorandum of Appeal and there have been assertions of this evasion of arrest in the course of the proceedings, more especially in the affidavit of the 29th of November, 1920, in which

1. (1883) I L R 6 M 365 2. (1920) 12 L W 710. 3. (1898) 8 M L J 203.

Ramanathan Chettiar v. Mohideen Saheb.

Phillips, J.

it was alleged that the judgment-debtor was evading arrest and that when steps were taken to enter his house a plea that goshā ladies were inside was raised and no one was allowed to enter. Apart from this affidavit we have the fact that a warrant was taken out on five occasions and returned unexecuted. It is suggested now that the judgment-debtor was unaware of these proceedings and was not in any way evading arrest and in fact, the judgment-debtor has appeared here and has asked for permission to file an affidavit to the effect that he was in Madras at the time the warrants were issued and was living quietly in the mosque and never attempted to evade arrest. We see, however, that notice of the execution petition was sent to him and it is quite clear that he received that notice and was represented by a Vakil in the lower Court who applied for an adjournment for putting in a counter-affidavit on the 27th of August, 1920. On the adjourned date, the Vakil reported that he had no instructions and the judgment-debtor was still absent. Two further warrants were issued after that and again the judgment-debtor could not be found. In these circumstances, we think that it is conclusively proved that the judgment-debtor was keeping out of the way in order to avoid arrest, and it would be useless to allow him now to put in any affidavit with a view to showing that he was perfectly innocent of any idea of fraud. We must hold that he was evading arrest in execution of this petition, and consequently under S. 48, the period of limitation is extended and this petition is in time. The appeal is therefore allowed. C. M. P. No. 813 will be referred for fresh disposal. Respondent will pay appellant's costs in C. M. A. No. 47 of 1922. No orders are necessary in C. M. A. No. 48 of 1922.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

The Official Receiver, Tanjore *Appellant** (*Petitioner*)

v.

Vedappa Mudaliar *Respondent* (*Respondent*).

Official Receiver, Tanjore *v.* Vedappa Mudaliar.

Provincial Insolvency Act (*V of* 1920), *S.* 53—*Voluntary transfer—Transfer by son in favour of father—Payment of existing debts of transferor—Provision for maintenance—Insolvency of transferor—Transfer when liable to be set aside—Fraud on future creditors*—Bona fides—*Valuable consideration—Burden of proof.*

A son transferred his share of the family properties in favour of his father in consideration of the latter paying off the existing debts and undertaking to maintain the wife and children of the transferor. Within two years of the transfer the transferor was adjudged an insolvent and the Official Receiver applied to set aside the transfer under S. 53 of Act V of 1920. *Held,* that the mere fact that the creditors of the transferor existing at the time of the transfer had been paid off did not take the transfer out of the reach of S. 53 of Act V of 1920. A person might commit "anticipatory fraud" by transferring his properties with a view to get into debt and disappoint his creditors. In that event the transfer could be impeached by his future creditors. *Stileman* v. *Ashdown,* (1742) 26 E R 688 ; *Thomas Pillai* v. *Muthuraman Chettiar,*(1909) I. L. R. 33 M 205 referred to.

Both good faith and valuable consideration must be proved to validate the transfer as against the Official Receiver and the burden of proof is on the person supporting the transfer. In determining the question whether the transfer was *bona fide* or intended merely for the purpose of screening the property from probable or possible creditors, the Court must take into account all the circumstances which surrounded the transaction, the covenants contained in the deed and the conduct, contemporaneous and subsequent, of the parties.

Denny (*Trustee*) v. *Denny and Warr,* (1919) 1 K B 583 ; *Ebrahim Bhai* v. *Fulbhai,* (1902) I. L. R. 26 B. 577 relied on.

Appeal against the order of the District Court of East Tanjore at Negapatam, dated 9th August, 1922, in I. A. No. 260 of 1921 in I. P. No. 29 of 1920 on the file of the District Court of Tanjore.

S. Subramania Aiyar for appellant.

A. V Visvanatha Sastri and *R. Sitarama Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal by the Official Receiver of Tanjore in an insolvency matter in which the Official Receiver

*A A O No. 462 of 1922. 16th April, 1924.

Official Receiver, Tanjore v. Vedappa Mudaliar.

applied to have a release deed or a transfer deed executed by the insolvent in favour of his father within two years of the insolvency to be declared void under S. 53 of the Provincial Insolvency Act V of 1920. The learned District Judge disposed of the case, we think, somewhat summarily; he fell into the initial error of thinking that, as at the time the release deed was executed all the previous creditors had been paid off and there were no creditors in existence, the deed could not be said to be in fraud of creditors and the subsequent creditors could not impugn it. We cannot accept this as a correct statement of the law. It has been laid down so early as 1742 in *Stileman* v. *Ashdown* (1) that, " It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent ; for, if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside. " A man can commit what may be termed compendiously " anticipatory fraud " and effect a transfer of his properties with a view to get into debt and prevent his creditors getting at his property. The view that was laid down in *Stileman* v. *Ashdown* (1) has been followed in *Thomas Pillai* v. *Muthuraman Chettiar* (2) and *Hoosain Bhai* v. *Haji Ismail Sait* (3). It follows, therefore, that one of the chief grounds taken by the District Judge for not setting aside this alienation is not good in law.

The second point the District Judge mentions is that in the present case there was consideration for the alienation, namely, the payment of debts and the maintenance of the executant and his wife and children. This might be no doubt some consideration for the transaction, but the question that has to be considered in such cases is the *bona fides* of the transaction. If the consideration is inadequate or is such that it shows that it was not a real consideration it certainly may be taken as one item for deciding whether the transaction itself was *bona fide* or not. Now, under S. 53 of the Act what has to be proved is that the transfer was in good faith and for valuable consideration if the transfer is within two years of the insolvency, the burden being on the person asserting it to prove it. Every transaction which an insolvent enters into within two years previous to his insolvency is treated by the Act as *prima facie* invalid and it lays the burden on the insolvent or

1. (1742) 26 E R 688.
2. (1909) I L R 33 M 205. 3. (1903) 5 Bom L R 253.

Official Receiver, Tanjore v. Vedappa Mudaliar.

the alienee to show that the transaction is a valid and *bona fide* one. Both good and valuable consideration have to be proved by the alienee or by the person who supports the transfer. On the side of the respondent some Indian and English cases were cited to us, viz., *Denny (Trustee)* v. *Denny and Warr* (4), *Ebrahim Bhai* v. *Fulbhai* (5), *Re Tetley* Ex parte *Jeffery* (6) and *Edward Russel William Hayward and others* v. *Elizabeth Hammond and others* (7). It will be noticed that in all these cases the learned Judges were able to come to the conclusion on the facts and circumstances of those cases that the transactions or alienations were *bona fide*, made in good faith and for valuable consideration. The circumstances under which the deed came to be executed, the covenants made in the deed and the conduct of the parties both at the time and subsequently have all to be taken into consideration ; and, if it can be held that the transfer at the time was really intended to be carried out and was made *bona fide* for saving the insolvent from incurring debts and ruining himself, it may be that the transfer would not be interfered with. But if, on the other hand, there are circumstances to show that the transferor was actually screening his properties from the reach of his future creditors, there will be good ground for holding that the transfer is a fraudulent one. As the learned Judge of the Bombay High Court in *Ebrahim Bhai* v. *Fulbhai* (5) points out, in determining the question whether the transfer was really *bona fide* or was intended merely for the purpose of screening the property from probable or possible creditors, the Court must take into consideration all the circumstances which surrounded the transaction and the conduct, contemporaneous and subsequent, of the parties. It is after examining the position fully that a conclusion should be come to by the Court on the question. In this case we think that we should send this case back for a fuller trial of the matter. No doubt the father of the insolvent had an opportunity of adducing all his evidence, but it is possible that he was misled as the learned District Judge was taking a strong view in his favour. We are willing to give him a further opportunity of adducing fresh evidence to show how far the transaction in question is a *bona fide* one. The Official Receiver will also have leave to adduce whatever evidence he wishes to adduce in rebuttal of the alienee's case.

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4. (1919) 1 K B 583.
5. (1902) I L R 26 Bom 577.
6. (1896) 75 L T 166.
7. (1742) 26 E R 9 at 11.

Official Receiver, Tanjore v. Vedappa Mudaliar.

We therefore set aside the order of the District Judge and remand the case for a fresh disposal in the light of the observations made by us above. Costs will abide and follow the result.

A. V. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

Rajarathna Naidu *Appellant* (8th respondent)*

v.

Ramachandra Naidu and others *Respondents (Petitioner and Respondents* 1 *to* 3 *and* 5 *to* 7).

Rajarathna Naidu v. Ramachandra Naidu.

Civil Procedure Code, O. 21, *R.* 16, *second proviso—Applicability of, to mortgage decrees.*

The second proviso to O. 21, R. 16, Civil Procedure Code has no application to mortgage decrees for sale.

Sadagopa Aiyangar v. *Sellammal,* (1922) 43 M L J 761 distinguished.

Laldhari Singh v. *Manager, Court of Wards,* (1911) 14 C L J 639, 642 *Jagabandhu* v. *Haladhar,* (1917) 27 C L J 110 relied on.

Appeal against the order of the District Court of Chingleput in Execution Petition No. 51 of 1920 in O. S. No. 32 of 1916.

S. E. Sankara Aiyar for appellant.

T R. Ramachandra Aiyar and *C. Narasimhachariar* for respondents.

The Judgment of the Court was delivered by

Wallace, J.

WALLACE, J. :—The question for decision is whether the second proviso to O. 21, R. 16, of the Code of Civil Procedure applies to a mortgage decree for sale. It applies in terms only to a decree " for the payment of money " The phrase in the old Code, S. 232 was " a decree for money." The alteration indicates that emphasis is to be laid on the word " payment " and that unless the decree directs payment of money, the rule will not apply. This is the view taken in the judgment of the Calcutta High Court in *Laldhari Singh* v. *Manager, Court of Wards* (1). The Calcutta High Court

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*A A O No. 436 of 1922. 10th July, 1924.

1. (1911) 14 C L J 639 at 642.

Rajarathna Naidu *v.* Rama-chandra Naidu.

Wallace, J.

has consistently held the view that this proviso will not apply to mortgage decrees for sale [*vide* the above ruling and also *Lalla Bhagun Pershad* v. *Halloway* (2) and *Jagabandhu* v. *Haladhar* (3)].

Appellant relies on three cases of this High Court. Two of these, *Vaidhianathaswami Iyer* v. *Somasundaram Pillai* (4) and *Ramayya* v. *Krishnamurthi* (5) are not of much assistance as they do not deal with the language of O. 21, R. 16, or the corresponding section under the old Civil Procedure Code. In *Sadagopa Iyengar* v. *Sellammal* (6), language somewhat favourable to appellant's contention has been used, but even in that case it is clear that the decree was a "decree for the payment of money," although in the case of the 1st defendant the decree directed the money to be paid out of his family property. None of these cases affects the general principle laid down in the Calcutta cases, and inherent, in our opinion in the rule itself, that the proviso does not apply to decrees which are in essence decrees, not for the payment of money but for the sale of property. We are of opinion that the order appealed against is correct and we dismiss this appeal with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Yadavendra Bhatta *Appellant** (*Plaintiff*)

v.

Srinivasa Babhu and others *Respondents* (*Defdts.*).

Yadavendra Bhatta *v.* Srinivasa Babhu.

Mortgage—Consideration unpaid for—Suit for—Maintainability—Mortgagor's right to obtain damages in such case—Transfer of—Validity—Transfer of Property Act, S. 6 (e).

The suit was for the recovery of a portion of the consideration for a mortgage left unpaid by the mortgagee. The plaintiff claimed under an assignment made by the mortgagor.

Held, that the suit was one to enforce an agreement to lend money on a mortgage and was unsustainable.

The mortgagor might in such a case have sued the mortgagee for damages, but a right to obtain damages cannot be transferred.

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2. (1885) I L R 11 C 393.

3. (1917) 27 C L J 110.

4. (1904) I L R 28 M 473.

5. (1916) I L R 40 M 296.

6. (1922) 43 M L J 761.

*Second Appeal No. 968 of 1921. 19th February, 1924.

Yadavendra Bhatta v. Srinivasa Babhu

Second Appeal against the decree of the District Court of South Kanara in A. S. No. 239 of 1920, preferred against the decree of the Court of the District Munsif of Karkal in O. S. No. 317 of 1919.

B. Sitarama Rao for appellant.

K. Yegnanarayana Adiga and *K. P. Sarvothama Rao* for respondents.

The Court delivered the following

JUDGMENT :—The second defendant executed a mortgage in favour of the first defendant. Out of the consideration, a small balance was not paid. The plaintiff sues for the recovery of that balance on the strength of an assignment made by the third defendant who himself had obtained a similar assignment from the second defendant. The first defendant pleaded that the balance was payable only on the performance of a certain condition. The lower appellate Court has clearly found that the second defendant made default and that the condition was not fulfilled. On this finding, the plaintiff can have no decree. Apart from this circumstance, it is perfectly clear on the authorities cited, *Anakaran Kasmi* v. *Saidamadath Avullah* (1), *Rajagopala Aiyar* v. *Sheik Davood Rowther* (2) and *Sheik Galim* v. *Sadarjan Bibi* (3), that the present suit is a suit to enforce an agreement to lend money on a mortgage and that such a suit does not lie. In *Anakaran Kasmi* v. *Saidamadath Avullah* (1) this is what the learned Judges say :—

"The Court ought not to make a decree for specific performance of an agreement to lend money on mortgage. Plaintiffs may obtain compensation or damages in a properly framed suit against the defendant for breach of his contract or they may redeem the mortgage on payment of the sum due."

The English cases on the point are referred to in *Sheik Galim* v. *Sadarjan Bibi* (3).

It was open to the mortgagor to sue the mortgagee for damages but a right to obtain damages cannot be transferred. See S. 6 (*e*) of the Transfer of Property Act.

The Second Appeal therefore fails and is dismissed with costs.

A. S. V. *Second Appeal dismissed.*

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1. (1879) I L R 2 M 79.
2. (1917) 34 M L J 342.
3. (1915) I L R 43 C 59.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Jambulinga Chetti and others *Petitioners*+ (*Accused Nos.* 1 *to* 6).

Jambulinga Chetti *In re.*

Penal Code—S. 441—Criminal trespass—Essentials of offence of—Intention to commit offence, etc.—Necessity—Prior unregistered sale-deed accompanied by possession—Subsequent registered sale-deed—Which prevails—Land under Rs. 100 *in value.*

Complainant was in possession of a vacant piece of land worth only Rs. 25 in right of the purchase thereof by his father from M. under an unregistered sale-deed, accompanied by possession. The land was subsequently sold by M. to D. under a registered sale-deed while complainant was in possession, the accused, who were the headmen of the village and looked after some small temple there, entered upon the land and put up a water pandal for the purpose of giving water to persons who attended the temple festival. The accused were convicted by the Courts below of the offence of criminal trespass for thus entering upon the land and putting up the water pandal. In doing so the accused acted with the sanction of D.

Held that the conviction was bad.

Under the law the subsequent registered sale-deed to D. prevailed against the earlier unregistered sale-deed, though accompanied by possession. It was open to D. to assert his title to the property as against the complainant's; and as the accused entered upon the land with his sanction no question of criminal trespass arose at all. Even assuming that the accused had committed trespass, they were not guilty of criminal trespass, because they did not go upon the land for the purpose of annoying any one or for committing any offence.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment, dated 9th July, 1923, of the Court of the Sub-divisional First Class Magistrate of Cuddalore in Criminal Appeal No. 79 of 1923, preferred against the judgment of the Court of the Stationary Third Class Magistrate of Ginjee in C. C. No. 990 of 1922.

V. N. Kuppu Rao and *P. Visvanatha Aiyar* for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—In this case the six accused who are the petitioners before me, have been convicted by the Third Class Magistrate of Ginjee of criminal trespass and sentenced to pay a fine of Rs. 10 each. The convictions and the sentences were upheld by the Sub-divisional Magistrate of Cuddalore.

Cr R C No. 683 of 1923.
(Cr R P No. 543 of 1923). 1st February, 1924.

Jambulinga Chetti *In re.*

The land on which the criminal trespass is said to have been committed was a vacant piece of land. It originally belonged to one Muthia Chetti. This is admitted on both sides. The complainant's father purchased it from Muthia Chetti first ; but he did not get a registered sale deed ; he, however, kept possession of the property and under the Transfer of Property Act, the property being worth only Rs. 25, that is, less than Rs. 100, title in it would certainly pass to him. But unfortunately for him Muthia Chetti again sold the land to one Dharma Chetti under a registered sale deed. It is clear law that the subsequent registered sale deed will prevail against the earlier unregistered sale deed, even though the latter is accompanied by possession. See *Ammani* v. *Jagannatha Reddi* (1).

While the land was in the possession of the complainant, the accused who are the headmen of the village and look after some small temple there, entered upon the land and put up a water pandal for the purpose of giving water to persons who attend the temple festival. They were charged with criminal trespass and mischief for cutting down some trees on this land, but they have been acquitted of the latter charge ; and I need not consider it any further. It is on this entering upon the land and putting up a water pandal that the charge of criminal trespass has been based against them. The accused pleaded that they were acting for the temple for whose benefit Dharma Chetti had purchased the property.

The lower Courts say on certain grounds, which seem to me doubtful, that it is not shown that the purchase money came from the temple. The temple accounts have not been produced and therefore the lower Courts held that the property is not proved to have been purchased for the temple by Dharma Chetti, but was purchased by him for himself. Dharma Chetti himself has given evidence in this case as D. W. 6 and he positively asserts that the purchase was for the temple. In the face of such a statement as this, it seems to me rather strange that the lower Courts should have found that the property was not purchased for the temple. Even taking the view that Dharma Chetti purchased the property for himself and not for the temple, it was certainly open to Dharma Chetti to assert his title to the property as against the complainant's: and if the accused went on the land, as they seem to have done,

1. (1915) M W N 442.

Jambulinga Chetti In re

with Dharma Chetti's sanction, it is difficult to see how any criminal trespass arises at all. The first Court says that this defence is an imaginary one. I am not able to see how it is. After all what they did on the land was to put up a water pandal, and even if they had committed trespass in entering upon the land which I do not find, I do not think there is evidence to establish any criminal trespass, for there is no ground for holding that they went on this land for the purpose of annoying any one or for committing any offence.

In these circumstances I have come to the conclusion that the conviction for criminal trespass cannot stand and must be set aside. The accused will be acquitted of the charge under S. 447, I. P. C., and the fines, if paid by them, will be refunded to them.

A. S. V. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

Kuppu Odayar *Petitioner** (*Petitioner*)

v.

Poomalai Goundan (*Counter-petitioner*).

Kuppu Odayar v. Poomalai Goundan.

Criminal Procedure Code, Ss. 144 and 439—Time-expired order—Revision—No interference.

Where an order passed by a Magistrate under S. 144, Cr. P. Code, has expired by efluxion of time, the High Court would not adjudicate on the merits of the order or annul it in revision.

Swaminatha Mudaliar v. *Gopalakrishna Naidu,* (1915) 28 I C 160 followed.

Muthukumaraswami Nadar v. *Muhammad Rowther,* (1921) 42 M L J 352 not followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898 and S. 107 of the Government of India Act praying the High Court to revise the order dated 1st November, 1923, of the District Magistrate of South Arcot in C. M. P. No. 29 of 1923.

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*Cr R C No. 891 of 1923. 28th March, 1924.
(Cr R P No. 712 of 1923).

Kuppu Odayar v. Poomalai Goundan.

E. L. Thoronton and *T R. Govindasami Mudaliar* for petitioner.

The Public Prosecutor and *R. Gopalaswami Aiyangar* for counter-petitioner.

The Court made the following

ORDER :—The order passed by the District Magistrate under S. 144, Criminal Procedure Code, on 23rd September, 1923, has expired.

It is therefore unnecessary to adjudicate upon the merits of the order, and it would be superfluous to annul an order which has long ceased to be in force, vide *Swaminatha Mudaliar* v. *Gopalakrishna Naidu* (1).

Nevertheless it has been strongly urged that the District Magistrate should not have issued an order under S. 144 and should not have discharged the Sub-divisional Magistrate's order under S. 107, Criminal Procedure Code, without finding that there was a danger of a breach of the peace even if the Goundans continued to be bound over to keep the peace. In *Muthukumaraswami Nadar* v. *Muhammad Rowther* (2) a learned Judge of this Court whose attention does not seem to have been drawn to *Swaminatha Mudaliar* v. *Gopalakrishna Naidu* (1) thought it incumbent on him to interfere in revision with an expired order. The cases quoted by him do not in my opinion support his view.

In *Ramanadhan Chetti* v. *Murugappa Chetti* (3) the fact that the order had ceased to be in force does not appear to have been brought to notice when the High Court heard the Criminal Revision Case and in *Govinda Chetti* v. *Perumal Chetty* (4) there was in fact one day more for the order to remain in force. It seems to me a waste of time to adjudicate upon matters which have no practical effect. I therefore dismiss the Criminal Revision Petition.

It will be sufficient to communicate to the District Magistrate for his future guidance a copy of the judgment of Ayling, J. in *Swaminatha Mudaliar* v. *Gopalakrishna Naidu* (5) as representing the proper course to be adopted by a Magistrate in dealing with cases in which his powers under S. 144 are repeatedly invoked.

A. V. V. *Revision petition dismissed.*

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1. (1915) 28 I C 160. 2. (1921) 42 M L J 352.
3. (1900) I L R 24 M 45. 4. (1913) 38 M 489. 5. (1915) 30 I C 144.

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT :—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

Lachmi Narain Marwari and others *Appellants**

v.

Balmakund Marwari and another *Respondents.*

P. C.
Lachmi Narain Marwari
v.
Balmakund Marwari.

Partition suit—Preliminary decree—Final decree—Proceedings for passing of—Plaintiff's default to take—Order to be made in case of—Dismissal of suit on ground of such default—Jurisdiction—O. 17, *R.* 2, *Civil Procedure Code—Revision against order of dismissal—Interference in—Civil Procedure Code of* 1908, *S.* 115 (*a*) *and* (*c*)—*Applicability.*

In a suit for partition a consent decree was passed in appeal by the High Court, and the suit was remitted to the Subordinate Judge in order that the necessary steps for effecting the partition of the undivided property and that the valuation of the eldest brother's share might be taken. The Subordinate Judge accordingly fixed a day for hearing the parties and gave them notice. But when the day came neither the plaintiff nor his pleader appeared, and the Sub-Judge dismissed the suit for want of further prosecution, purporting to act under O. 17, R. 2, Civil Procedure Code. His order was set aside by the High Court in revision under S. 115 of Civil Procedure Code of 1908. The High Court held that the case came both under paragraph (*a*) and under paragraph (*c*) of that section.

Held, by their Lordships that the case came under paragraph (*a*) of S. 115 ; that O. 17, R. 2 had no application to the case ; and that the Sub-Judge had no jurisdiction to make the order in question.

After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can apply to have it enforced.

If the Sub-Judge had made an order adjourning the proceedings *sine die,* with liberty to the plaintiff to restore the suit to the list on payment of all costs and Court-fees (if any) thrown away, it would have been a perfectly proper order.

Quaere Whether the case came, as held by the High Court, under paragraph (*c*) of S. 115.

Civil Procedure Code of 1908, *O.* 17, *R.* 2—"*Hearing*"—*Meaning—Occasions when interlocutory orders are sought if included.*

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*P C Appeal No. 4 of 1923
(Patna Appeal No. 28 of 1920). 10th July, 1924.

P. C.

Lachmi Narain Marwari v. Balmakund Marwari.

Quaere : Whether the "hearing" mentioned in O. 17, R. 2, Civil Procedure Code, only occurs when the Judge is taking the evidence or hearing arguments or otherwise coming to the final adjudication of the suit, with perhaps one extension to the occasion when issues are to be settled ; and was not meant to extend to occasions when interlocutory orders were being sought.

Appeal from a Judgment and Order (8th June, 1920) of the High Court of Judicature, which reversed an Order (5th November, 1919) of the Subordinate Judge of Ranchi.

On the 28th November, 1913, the plaintiff (first respondent) sued the defendants (appellants and second respondent) in the Court of the Subordinate Judge of Ranchi for recovery of a one-third share of the properties specified in the plaint by partition. The Subordinate Judge allowed the claim, and the defendants appealed therefrom to the High Court of Judicature. During the pendency of the appeal, the parties entered into a compromise, in accordance with which the High Court made the following consent decree on the 26th June, 1919 :—

"It is agreed by all the parties that if the property which is now in possession of Sheo Narain Marwari is brought into the hotch-pot, they will accept a partition on any terms that the Court shall direct. These appeals are accordingly dismissed in terms of the following order :—

"The whole property will be divided into four equal shares of which the plaintiff will get one. Sheo Narain Marwari, however, will be entitled to retain the property which is now in his possession on payment in cash of any amount by which his share will be found by the lower Court to exceed the value of one-fourth share of the whole property. In the event of the property now in possession of Sheo Narain being found to be less than the value of one-fourth share of the whole property, he will be entitled to receive an amount by which this property is found less than the value of one-fourth share.

"Each party will bear his own costs throughout."

The preliminary decree of the Subordinate Judge having been thus varied, the record was sent back in due course to the Subordinate Judge (S. C. Sen, Esq.), who then on the 27th October, 1919, made the following order :—

"Record received back from the Honourable High Court, on 15th September, 1919, while I was on tour at Hazaribagh. Parties to take necessary steps by 5th November, 1919."

The plaintiff's Vakil did not appear on the 5th November, 1919, and the Subordinate Judge thereupon made the following order :—

"I have been waiting for the plaintiff and his pleaders till 4-20 P. M., but no one appeared on repeated calls. Defendant is present. The suit is dismissed for want of further prosecutions."

P. C.

Lachmi Narain Marwari v. Balmakund Marwari.

On the 6th January, 1920, the plaintiff filed an application asking the Court to review its order of the 5th November, 1919, on the ground that he was not aware of the return of the record of the suit, that the order of the 27th October, 1919, had not been communicated to him by his pleader, and that he was not apprised of the order of the 5th November, 1919, until the 2nd January, 1920 ; but the Subordinate Judge rejected it on the 4th February, 1920, holding that though he did not apply his mind to the facts of the case for the purpose of adjudication in making the said order, the order was evidently made under O. 17, R. 2, of the Code of Civil Procedure, 1908, and that the plaintiff's remedy was to apply under O. 9, R. 9, of the Code, and not for review of the order, which he had done. The learned Subordinate Judge then concluded as follows :—

"The Court has no jurisdiction to nullify the consent decree passed by the Honourable High Court and the object of the order of dismissal was not to discharge or vacate appellate decree. The decree is certainly in existence, but the plaintiff is not entitled to further relief in the present litigation. I accordingly reject the application with costs."

The plaintiff appealed from this said order, and the High Court (Dawson Miller, C. J. and Mullick, J.) treating the appeal as a revision under S. 115 of the Code of Civil Procedure, held (4th February, 1920) that the order of the Subordinate Judge, dated the 5th November, 1919, was erroneous. Sir Dawson Miller, the learned Chief Justice, concluded his judgment in the following words :—

"It seems to me that the provisions of Rules 2 and 3 of O. 17 had no application. There was still a preliminary question to be decided as to the payment of the Commissioner's fees. That possibly might have been dealt with by the Judge on the 5th November, and in the absence of the plaintiff he would have been perfectly entitled to dismiss his petition asking that the Receiver should pay these fees. He, however, did not deal with any of these matters but merely by reason of the failure of the plaintiff to appear, dismissed the suit for want of further prosecution. In so acting he was in my opinion acting without jurisdiction, or at all events if he had jurisdiction to dismiss the suit, which he clearly would have in many cases of default, he seems to have acted with material irregularity in dismissing the suit on that occasion. Had he intended that the hearing of the suit should take place he ought to have made it quite clear from his order of 27th October, but having merely stated that the parties were to take necessary steps by that date, it seems to me that there was no proper notice to the parties that the hearing of the suit was intended to take place upon the 5th November, and that in these circumstances the Judge was clearly wrong in dismissing the suit entirely."

P. C.

Lachmi Narain Marwari v. Balmakund Marwari.

In the result, the High Court reversed the order of the Subordinate Judge, dated the 5th November, 1919, and remanded the proceedings to the Subordinate Judge for hearing according to law. From that order, the appellants appealed to His Majesty in Council.

E. B. Raikes for appellants.

B. Dube for respondents.

10th July, 1924. The Judgment of their Lordships was delivered by

Lord Phillimore.

LORD PHILLIMORE :—This is a suit for partition brought in 1913 by the youngest of a family of brothers against two of his brothers and the children of a third brother.

The eldest brother of all was omitted from the suit because it was suggested that he was already separate in estate. The original defendants, however, disputed this ; and he was at their instance made a defendant party.

At the hearing the Subordinate Judge took the view that he was separate and dismissed him from the suit.

Appeal was thereupon taken to the High Court at Patna, and ultimately the following consent decree was made. (His Lordship read the consent decree above set forth, and continued).

The suit was thereupon remitted to the Subordinate Judge in order that the necessary steps for effecting the partition of the undivided property into fourths and that the valuation of the eldest brother's share might be taken.

After decree it is open to any party to a suit, to whose interest it is that further proceedings be taken, to initiate the supplementary proceedings ; but in the ordinary case it is the plaintiff who moves.

The Subordinate Judge accordingly fixed a day for hearing the parties and gave them notice. But when the day came neither the plaintiff nor his pleader appeared. The defendants, or some of them, were represented, but took no steps and the Judge, after waiting all day, made the following order :—

"5. 11. 19. I have been waiting for plaintiff and his pleaders till 4-20 P. M., but no one appeared on repeated calls. Defendant is present. The suit is dismissed for want of further prosecutions."

P. C.

Lachmi Narain Marwari v. Balmakund Marwari.

Lord Phillimore.

This was an unfortunate order.

It appears from a subsequent judgment delivered by the learned Judge that it was rather made *in terrorem,* and in the expectation that the plaintiff after this sharp reminder would put himself in order by applying within the prescribed period of thirty days to have the order set aside, submitting to the necessary consequence of having to pay the costs thrown away by reason of his neglect.

The plaintiff, however, was again dilatory, and his pleader does not seem to have been well versed in the procedure, with the result that no such application was made in time, and recourse had to be had to the High Court ; and even then the first application was irregular.

The High Court was, however, fortunately in the interests of business and of justice, able to mould the application into one for the exercise of its powers of revision under S. 115 of the Code of Civil Procedure, 1908. Thereupon the High Court decided that the case came both under paragraph (*a*) and under paragraph (*c*) of that section ; and that the Subordinate Judge had exercised a jurisdiction not vested in him by law and had acted in the exercise of his jurisdiction with material irregularity ; and they set aside the order of the Subordinate Judge and ordered the case to be restored to his file ; but they made the plaintiff pay the defendants' costs.

It is from this order that the present appeal is brought by the defendants other than the eldest brother.

Their Lordships must express their surprise that there should be any such appeal. The parties had agreed that there should be partition, and would naturally wish that the partition should be completed, and that any obstacle which the dilatoriness or neglect of one of them had interposed should be removed. It was nearly seven years since the suit had been begun. The erring brothers had been chastened and made to pay their costs ; and it is difficult to discover that they had any grievance.

But as the matter has been presented to their Lordships, it must be decided. And their Lordships think that the decision of the High Court should be affirmed.

P. C.

Lachmi Narain Marwari *v.* Balmakund Marwari.

Lord Phillimore.

Their Lordships do not think it necessary to determine that the case came under paragraph (*c*) of S. 115. But they think that the order which he made was one which he had not jurisdiction to make.

It was based, as he subsequently explained, upon O. 17, R. 2. The Order is one headed : "Adjournments," and R. 2 is as follows :—

"Where on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. 9 or make such other Order as it thinks fit."

R. 3 of O. 9 enables the Court to dismiss the suit when neither party appears ; and R. 8 of O. 9 directs the Court, when the defendant appears and the plaintiff does not appear, to dismiss the suit, unless the defendant admits the plaintiff's claim or some part of it.

In the opinion of the Judges of the High Court, O. 17, R. 2 did not apply, because in this case it was "never intended that there should be a hearing of the suit in the ordinary sense of the word, but merely some interlocutory matter decided between the parties as to the future conduct of the suit."

In their view the "hearing" mentioned in this rule only occurs when the Judge is taking the evidence or hearing arguments or otherwise coming to the final adjudication of the suit, with perhaps one extension to the occasion when issues are to be settled ; and was not meant to extend to occasions when interlocutory orders were being sought.

Their Lordships do not think it necessary to determine whether the word "hearing" should or should not have this particular limitation ; because they think that the decision can be supported on another ground. After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can (as already stated) apply to have it enforced.

The Subordinate Judge seems to have felt this, for he observed :—

"This Court has no jurisdiction to nullify the consent decree passed by the Honourable High Court, and the object

P. C.

Lachmi Narain Marwari v. Balmakund Marwari.

Lord Phillimore.

of dismissal was not to discharge or vacate appellate decree. The decree is certainly in existence, but the plaintiff is not entitled to further relief in the present litigation."

In the first part of these observations the learned Judge seems to be qualifying his order as useless. By the second part he puts the plaintiff into an intolerable position, not able to go on with his suit, and yet not in a position to bring a fresh suit. Their Lordships are fully sensible of the necessity of leaving the Judges in India with ample power of discipline, and means to check neglect and delay. If, for instance, the Subordinate Judge had made an order adjourning the proceedings *sine die*, with liberty to the plaintiff to restore the suit to the list on payment of all costs and Court-fees (if any) thrown away, it would have been a perfectly proper order.

But, for the reasons which have been given, the case did not come under O. 17, R. 2, and the order made was made without jurisdiction, and was rightly set aside by the High Court, and this appeal should be dismissed with costs.

Their Lordships will humbly recommend His Majesty accordingly.

Solicitors for appellants *Watkins* and *Hunter*.

Solicitors for respondents *Barrow, Rogers* and *Nevill*.

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

Mallampati Narasimham *Petitioner** (*Accused*)

v.

Sub-Inspector of Police, Prattipad *Respondent* (*Complainant*).

Mallampati Narasimham v. Sub-Inspector of Police.

Penal Code—S. 353—Public servant acting in discharge of duty—Distraint warrant authorising distraint of property of defaulter—Attempt to distrain property of lessee of defaulter—Assault of person entrusted with warrant by lessee—Conviction of lessee for—Legality.

Where, under a warrant authorising distraint of the property of a person who had defaulted to pay water-tax, the person executing the warrant attempted

*Cr R C No. 929 of 1923. 11th April, 1924.
Cr. R. P. No. 746 of 1923.

Mallampati Narasimham v. Sub-Inspector of Police.

to distrain the property of the lessee of the defaulter and was assaulted by the lessee, *held,* that the lessee could not be convicted for assaulting a public servant in the discharge of his duty.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment, dated 24th September, 1923, of the Court of the Deputy Magistrate of Guntur in C. A. No. 56 of 1923, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Guntur in C. C. No. 161 of 1923.

Ch. Raghava Rao for petitioner.

The Public Prosecutor for respondent.

The Court made the following

ORDER :—The Public Prosecutor is not prepared to defend the action of the Village Munsif in attempting to distrain the moveable property of the lessee of the defaulter for unpaid water-tax. The warrant authorises distraint of the property of the defaulter. The defaulter in this case was the pattadar, a person different from the accused. The conviction for assaulting a public servant in the discharge of his duty cannot stand. It is quashed and the fine collected is directed to be refunded.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE VENKATASUBBA RAO.

Chokkalinga Pillay *Appellant* (Plaintiff)*

v.

Velayudha Mudaliar and others *Respondents (Defendants 2 to 4).*

Chokkalinga Pillay v. Velayudha Mudaliar.

Civil Procedure Code, Ss. 16, 21—Mortgage suit—Territorial jurisdiction of Court —Alteration of, prior to final decree—Decree if valid—Jurisdiction—Test of —Principle of S. 21—If applies to collateral proceedings—Waiver of jurisdiction.

Prior to the passing of a final decree in a mortgage suit the territorial jurisdiction of the Court over the suit properties was taken away by a Government Notification. No objection was then raised as to the competency of the Court to pass the final decree. In a suit brought to set aside the decree

*Appeals Nos. 312 and 329 of 1920. 16th January, 1924.

Chokkalinga Pillay v. Velayudha Mudaliar.

on the ground that the decree was void for want of jurisdiction, *held* the mortgage decree was valid and binding on the parties.

Per Phillips, J. :—The jurisdiction of a Court consists in its power to entertain suits and when once a suit has been properly entertained, its jurisdiction to try it to its conclusion is not removed unless it is specifically so done by the order of a competent authority.

Per Venkatasubba Rao, J. :—Where the parties to a suit invoked the jurisdiction of a Court to pass a decree, they cannot afterwards impeach the decree on the ground of want of jurisdiction.

The principle underlying S. 21, Civil Procedure Code, is that the plea of want of territorial jurisdiction may be waived. Though in terms it disallows objections by an appellate or revisional Court, the principle is of general application and if in appeal or in revision the decree cannot be impeached, it is equally reasonable that in a collateral proceeding it should not be allowed to be attacked. The section applies when there is want of jurisdiction not merely at the institution of the suit but at any stage during the progress of it

Appeals against the decrees of the Court of the Subordinate Judge of Mayavaram in O. S. Nos. 29 and 34 of 1917 respectively, dated 12th July, 1920.

A. Krishnaswami Aiyar and *K. S. Sankara Sastri* for appellant.

S. Srinivasa Aiyangar, *K. Bhashyam Aiyangar* and *K. Narasimha Aiyangar* for respondents.

The Court delivered the following

JUDGMENTS :—*Phillips, J.* :—This suit (O. S. No. 27 of 1917) has been brought to set aside the final decree in O. S. No. 15 of 1903 in the Kumbakonam Sub-Court and for recovery of the properties comprised therein. The first question we have to deal with in this appeal is whether that decree can be set aside as being absolutely void for want of jurisdiction. It is a decree in a mortgage suit instituted in 1903 when the Kumbakonam Court had jurisdiction over the place wherein the mortgaged property is situated. In 1907 the jurisdiction over this particular place was transferred from the Kumbakonam Court to the Mayavaram Court ; and, at the time of passing the final decree, the Kumbakonam Court had no jurisdiction over the place where the mortgage properties lie. The Subordinate Judge, relying on *Subbiah Naicker v. Ramanathan Chettiar* (1), has held that this decree was absolutely void, but has, for other reasons, dismissed the plaintiff's suit. Phillips J.

1. (1914) I L R 37 M 462 : 26 M L J 189.

Chokkalinga Pillay v. Velayudha Mudaliar.

Phillips, J.

In urging the appeal the respondents support the decree on the ground that this finding of the lower Court is not correct ; and it is argued that when the case has been properly instituted in a Court and is pending the mere transfer of territorial jurisdiction affecting that case does not transfer the proceedings which were actually pending in the original Court. It is also argued that inasmuch as the plaintiff not only consented to the jurisdiction of the Kumbakonam Sub-Court but actually invoked its jurisdiction in this particular case, he is barred by the principle of S. 21, Civil Procedure Code, from raising the objection now. No doubt, in *Subbiah Naicker* v. *Ramanathan Chettiar* (1), it was observed that, "unless the authority which changes the venue reserved the right to the Court which has lost the jurisdiction to continue pending proceedings affecting the property so transferred to another jurisdiction, such proceedings also, *ipso facto,* are transferred by the change of venue to the new Court." This observation in this particular case was made *obiter ;* and when this case was considered by another Full Bench in *Seeni Nadan* v. *Muthuswami Pillai* (2), some of the *obiter dicta* in *Subbiah Naicker* v. *Ramanathan Chettiar* (1) were overruled, although this one was not particularly specified. So long ago as 1900 in *Sadasiva Pillai* v. *Kalappa Mudaliar* (3) it was held that the right of appeal which existed when the suit was filed in a District Court was not taken away by a subsequent notification which removed the jurisdiction of the District Court to try such a suit and in the course of the judgment, we find the following :—"The District Judge held quite rightly that notwithstanding the notification he had jurisdiction to hear suit on the ground that it had been instituted before the notification came into force." Similarly in *Vedavalli Narasiah* v. *Mangamma* (4), it was held that where the jurisdiction of Civil Courts was taken away by S. 33 of Act II of 1894, this did not affect the suit which had been filed in a Civil Court before that section became applicable to the subject-matter of the suit. Again in *Subbaraya Mudaliar* v. *Rakkhi* (5) it was held that the Madras Estates Land Act did not take away the jurisdiction of Civil Courts to hear and determine suits which had been taken cognizance of by them before the

1. (1914) I L R 37 M 462 : 26 M L J 189.
2. (1919) I L R 42 M 821 : 37 M L J 284.
3. (1900) I L R 24 M 39.
4. (1903) I L R 27 M 538.
5. (1908) I L R 32 M. 140.

Chokkalinga Pillay v. Velayudha Mudaliar.

Phillips, J.

Act came into operation. It is difficult to discover any difference in principle between those cases and the present case where the territorial jurisdiction has been altered ; and in fact, it would appear that when the entire jurisdiction of the Civil Court has been taken away, such removal would apply with more force to pending suits than in a case where the jurisdiction of the Court over the particular place in which the property is situated has alone been removed. A large number of cases have been cited which deal with the jurisdiction of a Court to execute a decree properly passed by it, when territorial jurisdiction has been taken away after the passing of the decree. I do not think that much importance can be attached to these cases because there are certain special sections of the Code of Civil Procedure, *i. e.*, 37, 38, 39 and 150 which specifically deal with this point and there is no special provision in the Act which deals with pending suits. The jurisdiction of a Court consists in its power to entertain suits, and when once a suit has been properly entertained, it is difficult to understand how that jurisdiction is removed unless it is specifically so done by the order of a competent authority. Once the suit has been entertained, the remaining proceedings taken therein are not taken by reason of any particular territorial jurisdiction, but in the exercise of the powers vested in the Court to try suits generally and consequently the only time at which the territorial jurisdiction comes into operation is at the time of filing the suit. Once the Court has seizin of the case, it has jurisdiction to try it to its conclusion, unless there is any reason for holding that that jurisdiction has been removed. If this be the right principle and I think it is, it would account for the fact that there is no provision in the Civil Procedure Code for the trial of suits, pending in a Court which had territorial jurisdiction at the time of their institution, after such jurisdiction has been removed before the trial is concluded. In this view, it appears to me that the final decree passed in this suit was not passed without jurisdiction.

Support to the view that territorial jurisdiction is not more important than and in fact probably not so important as the other form of jurisdiction of a Court is given by the provisions of S. 21, Civil Procedure Code. Under that section unless objection is taken to the place of suing, which has been held to mean territorial jurisdiction, at the earliest possible

Chokkalinga Pillay v. Velayudha Mudaliar.

Phillips, J.

opportunity, no objection can be taken in appeal or in revision. That section is not strictly applicable to the present case for this is not an appeal from the original decree but it has been extended in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (6) to execution proceedings and in that case, it was held that the effect of the section is that objections which the appellate or revisional Court is thereby precluded from entertaining must be considered cured for all purposes unless taken before the passing of the decree in the original Court. In principle there is no distinction between applying the provisions of S. 21 to execution proceedings and applying them to a suit specially brought for the purpose of setting aside a decree. The principle underlying the section is that waiver of territorial jurisdiction is recognised by law, whereas it has been consistently held that other forms of jurisdiction, such as jurisdiction of the subject-matter or pecuniary jurisdiction cannot be waived by consent of parties. If territorial jurisdiction can be thus waived, it has admittedly been waived in the present case. I would therefore hold that for this reason also the final decree was passed with jurisdiction and it is therefore binding upon the plaintiff who was a party thereto.

There then remains for decision the question of whether the plaintiff is entitled to recover any portion of the plaint property. Under the preliminary decree it was provided that the mortgagors who had assigned their rights to the plaintiff could redeem the plaint property consisting of 5 velis and secure possession. The final decree was, however, passed in favour of the 1st defendant in the present suit, who was the 11th defendant in that suit at the request of the mortgagors. This request is contained in a petition, Exhibit II, in which the mortgagors stated that they had executed an agreement in favour of the 1st defendant, mentioning that the properties should be given to him and praying for delivery of the property and the documents connected therewith to him. This agreement was entered into between the mortgagors and the 1st defendant on the 21st of October, 1912, and Exhibit I purports to contain the terms of the agreement. It is now, however, pleaded that Ex. I in its present condition does not contain the terms of the actual agreement and it is alleged that the document has been

6. (1920) I L R 43 M 675 : 39 M L J 203 (F B).

tampered with since its execution so as to alter its terms. The agreement, as it now stands, is undoubtedly an agreement to convey the whole of the mortgage property to the 1st defendant, whereas the plaintiff now alleges that out of the 5 velis of mortgage property it was agreed that one veli should be retained by the mortgagors, as well as Rs. 1000 for which there is a provision in Exhibit I. This specific agreement was not pleaded in the present plaint for plaintiff sues for the recovery of the whole of the mortgage property on the ground that the final decree is void. When the 1st defendant filed a counter-suit, the subject-matter of Appeal No. 329 of 1920 for specific performance of the agreement, Exhibit I, making the plaintiff and the mortgagors parties, one of the mortgagors pleaded the agreement now set up. He did not then allege that Ex. I had been tampered with but he did state that though this was the real agreement between the parties, it was omitted to be expressed in the contract by the fraud of the plaintiff who falsely represented to him and his father that only 4 velis were mentioned in the document as the extent to be assigned to him. This statement was made on a perusal of a copy of Ex. I served on this mortgagor and before he had an opportunity of perusing the original, when the original was shown to him in the present suit he stated in his evidence that the portion relating to the sale of only 4 velis had been erased and it is that plea which is now strenuously put forward in appeal. There is evidence to support this plea, for we find in Ex. L, a letter written by Muthuswami Pillai to his son Ramaswami—these two being the mortgagors—that he stated that if the arrangement with the 1st defendant were carried out, they were to save one veli of land and get Rs. 1,000. This letter was written few days before Ex. I was executed and we find that subsequently on the 22nd November, 1912, the father writes to the son saying, "We have put in another petition praying that a sale deed excluding one veli of land should be executed." Again on the 25th November, 1912, he sent a notice to the 1st defendant intimating that he had agreed "to execute a sale deed of some of the lands out of the said lands." No doubt, a reply was sent to this notice by the 1st defendant, Ex. M (3), in which he denied this allegation ; but from that period the parties appear to have had disputes and instead of allowing the 1st defendant to recover all the mortgage properties in execution of the decree, Muthu-

Chokkalinga Pillay v Velayudha Mudaliar.

Phillips, J.

swami Pillai himself obtained possession of the properties from the mortgagee, the 10th defendant, and remained in possession at any rate until August, 1913, when the 1st defendant took out execution. It is quite clear from this evidence that there must have been some talk of one veli of land being retained by the mortgagors and it is quite probable that an agreement was come to with that condition. When the erasure was pointed out by Ramaswami as P. W. 2—it was evidently an obvious erasure—it ought to have been explained by the 1st defendant. However, when the 1st defendant's *Kariastan* was examined, he admitted the erasure but was unable to give any explanation thereof. Before the trial the 1st defendant died and his son, the 2nd defendant, was examined as D. W. 6 and he furnished no explanation at all. The document has been carefully examined by us and it is quite clear that there have been erasures in three different portions of the document in paragraph 3, in paragraph 4 and in the correction statement. The erasure has been very carefully done and a casual glance at the document would not reveal it, for the letters have been removed without removing much of the surface of the paper. The most obvious erasure is at the end of the document and possibly this was the only one to which attention was drawn in the lower Court. A more careful examination of the document has now revealed the further erasures and Mr. T. M. Krishnaswami Aiyar for the appellant says that with the aid of a magnifying glass he is able to make out some of the words which had been erased and that those words show that there was a provision in the document whereby the 1st defendant was only to get four velis of land. It is perhaps unfortunate that an issue as to the alteration of this document was not specifically framed, but it could not very well have been framed until the oral evidence had been begun, and it can hardly be said that the defendants have been prejudiced by the omission, for the fact of erasure was alleged at the earliest opportunity and the defendants' witnesses were cross-examined on the point. The document is not a registered document and ordinarily when a party relies upon a document which has obviously been altered by erasure or interlineation, etc., it is incumbent on him to explain how it occurred. The suggestion now made is that these erasures have somehow been inserted since the document was filed in this suit; but no explanation is attempted as to how this has been done

and certainly the appearance of the document does not support the allegation. It is also argued that assuming the erasures to have been made as now alleged, the language of the document is inconsistent for the following reasons :—In paragraph 2 we have the following recital "We have this day presented a petition in Court requesting to deliver to you alone the documents, etc., which, according to law we have to get back from the 10th defendant and to transfer to you alone the properties from the said person, and we have appointed you for the purpose." In paragraph 3 it is alleged that the words "and one veli of land" should be inserted after the words "Rupees one thousand." These two paragraphs contemplate the execution of the decree by the 1st defendant in which case he was to get possession and obtain a transfer from the 10th defendant, the mortgagee, within four months thereafter he was to give the mortgagors Rs. 1,000 and one veli of land; paragraph 4 deals with the alternative case, *viz.*, that if the mortgagors executed the decree and obtained delivery, they should execute a sale deed in respect of four velis in favour of the 1st defendant ; and the Rs. 1,000 to be paid to them was included in the sale price. It is argued that there would have been a provision in paragraph 2 in respect of the one veli, that a transfer deed should be executed by the 1st defendant to the mortgagors and as we find no such provision there has been no erasure as suggested. It must, however, be remembered that the mortgagors had paid the mortgage amount and were still the owners of the mortgage property and, consequently, there was no necessity for a sale deed transferring to them a portion of their own land. The 1st defendant was merely to be the person appointed by the mortgagors to take delivery on their behalf. If he did so, he obtained possession and had merely to deliver up one veli to the original owners, no transfer deed being necessary as there was no transfer of title. This argument, therefore, that the document would be inconsistent, if the words said to be contained therein and erased had really been there fails.

It is then contended by the defendants that, inasmuch as the plaintiff seeks to recover this one veli of land and alleges fraud on the part of the defendants, it is incumbent on him to prove this fraud conclusively. The plaintiff does not, however, rely on this document but merely on an agreement be-

Chokkalinga Pillay *v.* Velayudha Mudaliar.

Phillips, J.

tween the mortgagors and the 1st defendant and points out that Ex. I, the documentary evidence adduced to prove this agreement is defective by reason of the erasures. It is further argued this document, Ex. I, has frequently been produced in Court on former occasions and no objection has been taken by the plaintiff until now. It was, no doubt, filed in the proceedings prior to the passing of the final decree and afterwards in claim proceedings and in a criminal case as to possession. This latter was as late as 1916, and the translation of the document appears in the printed papers in Criminal Revision Case No. 342 of 1916 against the order in the possession case. There it is in the same form as it is now, but is rightly pointed out by the appellant's vakil that in none of those proceedings were the actual terms of the agreement in dispute and that it was not necessary for the purposes of those proceedings for the plaintiff to examine the document carefully. As I remarked before, the erasures are not so obvious as to be observed at a casual glance and, consequently, it is impossible to attach very much importance to the fact that objection was not taken in the earlier proceedings. This suit was filed early in 1917 which was shortly after the criminal revision case was disposed of in May, 1916. It appears to me that the plaintiff has established the fact of these alterations in the document and, consequently, its value as evidencing the terms of the agreement is very seriously discounted. Against this evidence we have Exs. L and L (1) and M and the evidence of the mortgagor as P. W. 2, and this evidence is preferable to the mutilated document and I would, therefore, hold that the agreement was in respect of only four velis of land, and not five as contended for by the defendants.

It is then suggested that, inasmuch as the defendants obtained possession through the decree, that decree is binding on the plaintiff ; but it is evident that the 1st defendant only obtained possession by being a person appointed by the mortgagors to take delivery and, consequently, title to the land would not pass to him thereby.

It is also argued that the present suit is barred by limitation on the ground that the present prayer, is, in effect, a prayer to enforce specific performance of the agreement ; but, inasmuch as the mortgagor did actually obtain delivery of the mortgage property and was in possession after the decree

thereby obtaining what was due to him under the agreement, this cannot be deemed to be a suit to enforce this agreement but is a suit to recover land to which he is entitled and of which he has been dispossessed. In that view, which I accept, the suit is within time.

I would, therefore, allow the appeal in part and give plaintiff a decree for the recovery of one veli of land out of the five velis mortgaged and order the parties to pay and receive proportionate costs.

It follows that Appeal No. 329 of 1920 must be dismissed with costs.

Venkata-subba Rao, J.

Venkatasubba Rao, J.:—This appeal raises two questions: first, a question of law, which refers to the entire subject-matter of the suit; and secondly, a question of fact, which has a bearing only upon a portion of that subject-matter.

The point of law to be determined is, whether the final decree passed by the Subordinate Judge of Kumbakonam, dated the 25th of January, 1913, in O. P. No. 15 of 1903 is a nullity, for the reason that previous to the date of that decree, in virtue of a Government Notification, dated the 24th August, 1907, the Kumbakonam Sub-Court had ceased to have jurisdiction over certain tracts within the limits of which the suit properties are situated. The learned Subordinate Judge has decided the question in favour of the plaintiff holding that the decree is void as it was passed without jurisdiction, but he gave findings adverse to the plaintiff on the other issues raised and dismissed his suit. In my view the lower Court's judgment can be supported on the ground that the decree is not a nullity and it is therefore unnecessary to deal with the other points adverted to in the judgment of the learned Subordinate Judge.

His Lordship then states the facts.

I shall now state the point of law raised. The Subordinate Judge's Court of Kumbakonam had jurisdiction to try O. S. No. 15 of 1908 when it was filed in his Court. But the notification referred to already was passed on the 24th August, 1907 and runs thus :— "It is also hereby directed that the Subordinate Judge's Court of Kumbakonam shall after the said date (2nd September, 1907) cause to have and exercise jurisdiction over the Munsifis of Valangiman, Mayavaram and Shiyali and shall continue to have and exercise jurisdiction over

the Kumbakonam Munsifi only. It is urged on behalf of Chokkalinga Pillai that the final decree passed by the Kumbakonam Sub-Court is not valid as that Court ceased to have jurisdiction over the mortgaged properties, and next it is said, the final decree and all that followed upon it being therefore of no effect the plaintiff is entitled to ignore the whole proceedings and recover from Chokkalinga Mudali the properties.

On the question as to whether the old Court of the Subordinate Judge of Kumbakonam or the new Court of the Subordinate Judge of Mayavaram had jurisdiction to pass the final decree long argument was addressed to us. But I refrain from expressing any opinion on it as in my view it is immaterial which of the two Courts had jurisdiction to deal with the further proceedings in O. S. No. 15 of 1903 which included the passing of a final decree in it. The question that has been raised is a very important one and the law upon it is uncertain. Whatever may be the right view, so long as there remains any doubt in regard to the Court having jurisdiction, great inconvenience and in many cases grave injustice is bound to result, and it is very essential that at an early date the legislature should enact clearly which Court in such circumstances has jurisdiction to proceed with the suit.

I am disposed to base my judgment on the ground that there has been a waiver of the plea of want of jurisdiction. It was open to the parties to waive objection regarding want of territorial jurisdiction and in this case not only did the mortgagors waive the objection, but as will appear from my statement of the facts they themselves invoked jurisdiction of the Kumbakonam Sub-Court and it is not therefore open to the plaintiff Chokkalinga Pillai to impeach the decree on the ground of want of jurisdiction. The principle underlying S. 21 of the Civil Procedure Code is that the plea of want of territorial jurisdiction may be waived. This section enacts an exception to the general rule that parties by mutual consent cannot confer upon a Court jurisdiction where it has not, the exception enacted being that when the question is one of territorial jurisdiction the plea may be waived. S. 21 runs thus :—

"No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible

opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice."

Under the section, objection will not be allowed unless it was taken at the earliest possible opportunity and unless there has been a failure of justice. The section in terms no doubt does not apply, because it refers to the disallowing of the objection by an appellate or revisional Court. But the principle is of general application and if in appeal or revision the decree cannot be impeached it is equally reasonable that in a collateral proceeding it should not be allowed to be attacked. I respectfully adopt the statement of the law contained in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (6) to the effect that the principle underlying S. 21 is that the objection to territorial jurisdiction is cured not merely for the purpose of the appellate and revisional Court but cured entirely and for all purposes. In my opinion again, this section applies when there is want of jurisdiction not merely at the institution of the suit but at any stage during the progress of it. It is difficult to believe that a more stringent rule was intended to be applied to cases where there has occurred a cessation of jurisdiction than to those where there has been initial absence of jurisdiction.

There is another aspect of the case which should not be overlooked. The foundation of the plaintiff's title is the preliminary decree. But if his argument that the Sub-Court of Kumbakonam lost jurisdiction subsequent to the notification is correct, the preliminary decree based as it was on a finding submitted by that very Court would be itself ineffectual and the plaintiff would thus be out of Court.

On the point of law, therefore, that this appeal raised, I concur with the finding of my learned brother.

T. S. V. *Appeal allowed in part.*

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6. (1920) I L R 43 M 675 : 39 M L J 203 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

K. V. Ramachari *Petitioner* in C. R. P. Nos. 86 and 87 and respondent in C. R. P. No. 116 of 1924 (Petitioner—1st Defendant and Petitioner respectively)*

v.

K. V. Krishnamachari and another *Respondents in C. R. P. Nos. 86 and 87 and petitioners in C. R. P. No. 116 of 1924.*

Ramachari *v.* Krishnamachari.

Civil Procedure Code—O. 11, R. 14—Inspection of adversary's documents—Order permitting—Propriety—Conditions—Notice to opposite party—Necessity—Partnership—Declaration of right as partner and taking of partnership accounts—Suit for—Inspection by plaintiff of alleged partnership accounts—Order permitting, before commencement of trial—Inspection by employee in defendant's firm who had been won over by plaintiff—Revision—Interlocutory orders of Court below—Interference with—Conditions.

Inspection by a party of his adversary's documents is not a matter of routine, but is to be permitted or refused only after a judicial decision not only as to the right to inspection itself, but with reference also to the stage of the case at which such right is to be permitted ; and the right must be exercised so as to result in as little harm as possible to parties who are entitled to have the protection of the Court in carrying on their lawful pursuits.

In a suit in which the two main contentions were (1) whether plaintiff was really a partner in 1st defendant's firm and trade, and (2) whether he was therefore entitled to a taking of the partnership accounts, the defendant filed various lists of documents and produced various documents with an affidavit praying that the Court should no allow inspection of any document by plaintiff without specific orders and without notice to him.

Before the trial of the suit had begun, the Court made an order, without notice to the defendant, allowing the plaintiff to inspect a number of documents produced by the defendant.

Held, in revision against the order of the Court below, that plaintiff could not be allowed, unless and until he had established that he was a partner, to inspect any documents which did not bear on the question of partnership, and that as regards documents which did bear upon it the Court below must hear the defendant's objections before it passed its order.

Following on the order referred to above, the Court below passed a further order permitting M, who had obtained a power of attorney from plaintiff, to inspect all the defendant's documents.

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*C. R. P. Nos. 86, 87 and 116 of 1924. 4th April, 1924.

M was employed in the defendant's firm for at least 20 years, writing up and keeping the firm's accounts; he had left defendant's service and reverted to plaintiff's side in the dispute between plaintiff and defendant ; and he actively supported plaintiff and was ill-disposed towards defendant. M was employed by the plaintiff for the purposes of inspection because of his exclusive and intimate acquaintance with the firm's business.

Held, in revision against the said order, that unless and until plaintiff established his plea of partnership, inspection on his behalf by M could not be permitted and that such inspection as the lower Court permitted must be by some one else.

There would be no objection to an inspection by M after the plaintiff established his plea of partnership.

Interference by the High Court in revision with the proceedings of a lower Court during the pendency of a suit are to be deprecated unless strong reasons are made good.

Interference in the present case was based partly on the ground that the lower Court had not properly understood the provisions of O. 11, R. 14, Civil Procedure Code, and partly on the gıound that the result of the orders of the Court below might be wholly unnecessary and irremediable damage to the defendant's business interests.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Second Additional Subordinate Judge of Madura, dated 1st December, 1923, 2nd November, 1923 and 1st December, 1923, and made in I. A. No. 238 of 1923 in O. S. No. 8 of 1923, plaintiffs' memo., dated 24th October, 1923 and the said I. A. No. 238 of 1923 in O. S. No. 8 of 1923 respectively.

A. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar* for petitioner.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—First defendant in O. S. No. 8 of 1923 on the file of the Second Additional Subordinate Judge's Court, Madura, has put in two revision petitions Nos. 86 and 87 of 1924 asking for revision of two interlocutory orders of the Subordinate Judge with reference to inspection of his documents by plaintiff. Interference by this Court with the proceedings of a lower Court during the pendency of a suit is to be deprecated unless strong reasons are made good, but in the present case I think that the revisional powers of this Court must be exercised,

Ramachari *v.* Krishnamachari.

partly on the ground that the lower Court has not properly understood the provisions of O. 11, R. 14, of the Civil Procedure Code, and partly on the ground that the result of its orders may be wholly unnecessary and irremediable damage to 1st defendant's business interests.

There are two main contentions in the suit—(*a*) that plaintiff is really a partner in 1st defendant's firm and trade, (*b*) that plaintiff is therefore entitled to a taking of the partnership accounts. In his written statement 1st defendant referred, without giving particulars, to a number of documents on which he proposed to rely. Later on he filed various lists of them at various times and produced about 1,400 documents and put in a final affidavit of documents on 20th September, 1923, in which he prayed the Court that it should not allow inspection of any document by plaintiff without specific orders and without notice to him. On 24th October, 1923, plaintiff, without filing any affidavit, put in a memo. asking for inspection of all documents filed in Court by defendant and followed that up on 1st November, 1923 by an affidavit in which he requested that one Mannar Aiyar be permitted to inspect on his behalf. On that the lower Court on 2nd November, 1923 passed the first order now under revision, permitting plaintiff to inspect 212 documents, but refusing to allow Mannar Aiyar to inspect as he was not a power-of-attorney agent for plaintiff.

I cannot assent to the proposition that, when a party was produced in Court under O. 11, R. 14, documents in his possession but has urged that inspection should not be allowed before hearing his objections, the Court has a right to ignore that protest and the other party has a legal right to inspect all documents relating to all issues and to all stages of the trial of the suit, *i. e.*, that the mere production by one party gives an immediate and indefeasible right of inspection to the other. I do not read O. 11, R. 14, as justifying any such conclusion. As the Court was proceeding according to the usual practice in the moffussil, to allow inspection in Court under O. 11, R. 14, and not under R. 15, I hold it was bound to consider 1st defendant's objections to inspection and especially bound to consider whether plaintiff was entitled to inspect all these documents *at that stage of the case,* viz., before trial had begun. As pointed out above, the first point to be decided in the case is whether plaintiff is or was a partner in 1st defendant's trade. Until that is decided, in plaintiff's favour, obviously plaintiff has no right

whatever to be allowed to inspect the trade accounts, apart from those which bear on the question of partnership. The Court has no right to assume that plaintiff is a partner, and, if it must hold that he is not unless and until he proves that he is, clearly it is unjustified in law in allowing a stranger, merely on the allegation that he is a partner, permission to inspect all the trade accounts of 1st defendant. The conduct of business would be impossible under such conditions and the Court has clearly lent itself to a course which is wholly opposed to public policy, and it is therefore necessary for this Court to interfere.

On this part of the case then, viz., on C. R. P. No. 87 of 1924, the proper order is that plaintiff cannot be allowed, unless and until he has established that he is a partner, to inspect any documents which do not bear on this question of partnership, and that as regards documents which do bear on it the lower Court must hear 1st defendant's objections before it passed its order. If and when plaintiff has established his partnership, then the lower Court will similarly consider if plaintiff is entitled to inspect the remaining documents. I reverse the order under revision in C. R. P. No. 87 of 1924 and order accordingly.

In C. R. P. No. 86 of 1924 the lower Court has still further wandered from what I regard as the first principles of public policy. Following on its order of 2nd November, 1923, it passed a further order on 1st December, 1923 permitting Mannar Aiyar to inspect all 1st defendant's documents (Mannar Aiyar having by then obtained a power of attorney from plaintiff), provided plaintiff undertook not to examine Mannar Aiyar as a witness. Plaintiff in his turn has filed C. R. P. No. 116 of 1924 against the imposition of this condition. Now without going into the details of affidavits on the relations of 1st defendant and Mannar Aiyar, the following points are clear :—(*a*) this Mannar Aiyar was employed in 1st defendant's firm for at least 20 years from 1898 to 1918, writing up and keeping the firm's accounts ; (*b*) he left 1st defendant's service in 1918 and reverted to plaintiff's side in the dispute between the plaintiff and 1st defendant and is now actively supporting plaintiff under circumstances which indicate that he personally ill disposed towards 1st defendant ; and (*c*) that plaintiff wants Mannar Aiyar to inspect the accounts and Mannar Aiyar himself wants to inspect them because he already knows the firm's business so

Ramachari v. Krishnamachari

thoroughly that he will be able to detect if there has been any tampering with the accounts.

As *supra*, the Court is for the present to assume that plaintiff is an outsider to the firm, who has been able to gain over to his side a disgruntled former employee of 1st defendant and has given him a power of attorney for the express purpose of setting him to a roving inspection of 1st defendant's accounts and this is what the lower Court is permitting him to do. Such a course seems to me in the highest degree objectionable and contrary to public policy. That any outsider by mere allegations in a plaint should be able to obtain from a Court the power of inspection of all firm's books by a former employee of the firm who knows the firm's business for over 20 years and who is employed by the plaintiff for the purpose of that inspection, not because of his skill as accountant and auditor, but because of his exclusive and intimate acquaintance with all the firm's business, is a position that cannot be defended, and to permit it would be to put an end altogether to any privacy and confidential dealings in business.

The various rulings of English Courts which have been cited to me clearly establish the proposition that a Court can and must exercise discretion as to whom it is going to permit to conduct such an inspection and the case in *Enamul Huq* v. *Ekramul Huq* (1) is to the same effect. The absence of a power of attorney (as in that case) does not alter the personality of the proposed inspecting agent. I am strongly of opinion that, until and unless plaintiff establishes that he is a partner of the firm, Mannar Aiyar is, from his previous connection with the firm, a wholly undesirable person to allow to inspect the accounts for plaintiff. If, however, plaintiff establishes that he is and was a partner, then as such partner he is entitled to the fullest scrutiny and knowledge of the firm's accounts and affairs, and the objection to an inspection of all the firm's books on his behalf by Mannar Aiyar, who would then in his connection with the firm have been servant of plaintiff as much as of 1st defendant, would disappear.

I must therefore reverse the order under revision in C. R. P. No. 86 of 1924 also and order that unless and until plaintiff establishes his plea of partnership, inspection on his behalf by

1. (1897) I L R 25 C 294.

Mannar Aiyar cannot be permitted and such inspection as the lower Court permits must be by some one else.

Ramachari *v.* Krishnamachari.

First defendant will get his costs on both these petitions. C. R. P. No. 116 of 1924 is dismissed with costs, Rs 50 being allowed for printing.

I must impress on the lower Court that such a privilege as inspection by a party of his adversary's documents is not a matter of routine, but is to be permitted or refused only after a judicial decision not only as to the right to inspection itself, but with reference also to the stage of the case at which such right is to be permitted, and that it is to be exercised so as to result in as little harm as possible to parties who are entitled to have the protection of the Court in carrying on their lawful pursuits.

A.S.V. *Order reversed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE RAMESAM.

Movva Subbarao (late a minor, but now a major, *vide* Order, dated 4th February, 1924, on C. M. P. No. 403 of 1924) *Appellant* (Plaintiff)*

v.

Movva Ademma and others *Respondents (Defendants Nos.* 1, 2, 5, 6, 8, 9, 19, 21, 22, 24, 29, 30, 31 *and legal representatives of deceased* 24*th defendant).*

Hindu Law—Joint family—Father—Gift by—Validity against son—Condition —Gift to wife or to mother—Gift to daughter—Distinction.

Movva Subbarao *v.* Movva Ademma.

There is no warrant for the proposition that a member of a joint Hindu family can make a gift of the joint family property if the property gifted does not exceed what he would obtain for his share on partition. That fact only furnishes a maximum limit, and the Court has to be satisfied that the gift is otherwise reasonable.

As regards its validity a gift of joint family property by a father to his widow or to his mother stands on a different footing from a gift by him to his daughter.

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*Appeal No. 4 of 1921. 25th April, 1924.

Movva Subbarao v. Movva Ademma.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in O. S. No. 103 of 1917.

V Ramadoss and *V Krishna Mohan* for appellant.

A. Krishnaswami Aiyar, P. Somasundaram and *K. Kameswara Rao* for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.* :—This appeal arises out of suit by the plaintiff to establish his adoption, to set aside certain alienations made by or on behalf of his adoptive father and to recover the family properties.

Plaintiff was adopted by Movva Sankariah in 1911. He left the adoptive father's house in 1913. Sankariah suffered from dropsy in 1916 and 1917 and died on 23rd July, 1917. The 1st defendant is Sankariah's widow, the 2nd defendant is his mother and the other respondents are other alienees. The Subordinate Judge gave a partial decree to the plaintiff. The plaintiff appeals as to the rest of the properties.

The first point argued for him is that Sankariah was insane from 1913 up to his death. It may be taken that he was insane from December, 1910 till the end of 1911 (D. W 16) with perhaps occasional lucid intervals and even up to May, 1912 (D. W. 30). Not only there is no reliable evidence to show that he was insane in 1913, 1914 and 1915 but there is overwhelming documentary evidence from which it can be inferred that he was not insane—several of these being registered documents and it must be presumed that the registering officers were satisfied that he was in a proper state of mind. It follows that the documents executed by Sankariah cannot be attacked on this ground. Seeing that plaintiff's natural father is not a stranger but cousin of Sankariah, it is not likely that he would allow so many transactions effected in the name of Sankariah to remain unchallenged, if he was really insane.

The next point argued for the appellant is the alienation under Ex. LXIII (dated 26th February, 1915) in favour of the 21st defendant. The larger part of the consideration (Rs. 1,375) was for discharging prior debts and only Rs. 260—12—6 represented the cash paid before the Sub-Registrar. The debts were evidenced by Exs. 86, 63-A, 111, 102, 82, 102-A. Excepting Ex. 111, these documents could

Movva Subbarao v. Movva Ademma.

Ramesam, J.

not be attacked by the appellant. Ex. 111 was executed on 12th September, 1911, when there is a suspicion that he was of unsound mind. But it was in renewal of a prior genuine promissory note and Sankariah himself made payments towards it in 1914 and 1915 and his agent made a payment in 1916. The only inference is that the document was perfectly valid and binding and probably on the date of the Ex. 111, he was in one of his lucid intervals.

The next point argued relates to the 5th defendant. This does not relate to an alienation by Sankariah but to a recognition by him that certain properties standing in his name really belonged to the 4th defendant. The history of the transactions connected with it begins in 1869. The motive for the benami and the fact of benami have been so completely proved that the appellant's Vakil could scarcely meet the reasons given by the learned Subordinate Judge in paragraphs 60-68 of his judgment.

The appeal fails and is dismissed with costs, proportionate to the interest of each respondent—printed papers will be separate for each.

There is a Memorandum of Objections by the 1st and 2nd defendants. Sankariah executed a deed of gift in her favour on 14th February, 1914 (Ex. XLV) for 10 acres and 63 cents. Of this she sold 5 acres and 16 cents to the 24th defendant (under Ex. LI) and to this extent the gift is upheld by the Subordinate Judge as reasonable. The Memorandum of Objections relates to the balance. The learned Vakil for the 1st respondent relies on *Arunachala Pillai* v. *Sampurna Thachi* (1) and *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (2).

No doubt it is settled law that a reasonable gift to a daughter by a father of joint family property will be upheld, *Anivillah Sundararamayya* v. *Cherla Seethamma* (3) ; *Appan Patrachariar v. Srinivasachariar* (4) ; *Sundararamayya* v. *Seethamma* (3). But in this case the 1st and 2nd defendants being widow and mother of Sankariah stand on a different footing. It is certainly open to Sankariah to make reasonable arrangements for their maintenance after his death. The gift to 2nd defendant is only of 2 acres and 99 cents. There is

1. (1907) 27 M L J 485. 2. (1913) I L R 40 C 966 (P C).
3. (1911) I L R 35 M 628 : 21 M L J 695. 4. (1917) 32 M L J 364.

Movva Subbarao v. Movva Ademma.

Ramesam, J.

no reason why the gift to 1st defendant should be more than 5 acres and 16 cents. I do not think there is any warrant for the proposition that a member of a joint family can make a gift of the joint family property if it does not exceed what he would obtain for his share on partition. The cases relied on by the respondent do not establish such a proposition. The cases only show that that fact furnishes a maximum limit and we have to be satisfied that it is otherwise reasonable. To say that he might have insisted on an immediate partition and might have given away the whole of his share seems to me fallacious reasoning. If he so enters into a partition, he has not got the further chance of getting the other properties by survivorship. If a gift of a property equal to his share is upheld, we have this strange anomaly, *viz.*, that, while giving away all his share, he continues a member of the joint family in respect of the rest of the property. Does he possess a share in it ? Can he again alienate his share in it by a gift ? In this case the consideration for the sale deed by 1st defendant in favour of 24th defendant (Rs. 5,000) was deposited in Court in pursuance of a decree for specific performance and presumably she has got all the money and keeps it and I don't see any reason to sympathise with her position. I would uphold the judgment of the Subordinate Judge as proper and equitable in all the circumstances of the case.

As the 1st defendant and plaintiff have succeeded half and half, there is no reason to disturb the order of the Subordinate Judge as to costs though, otherwise, the reason given by him for disallowing defendants costs are not satisfactory. I would dismiss the Memorandum of Objections of 1st and 2nd defendants with costs. The Memorandum of Objections of respondents 3, 5, and 6 must be allowed with costs.

The Chief Justice :—I agree.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Areti Subbayya *Appellant** (*Defendant*)

v.

Sree Raja Venkataramiah Apparao Bahadur Zamindar Garu and another *Respondents* (*Plaintiffs* 2 & 3)

Subbayya v. Sree Raja Venkataramiah Apparao Bahadur.

Madras Estates Land Act, S. 163 (2)—Mesne profits—Waste land usually submerged in water—If ryoti land—Civil Court—Jurisdiction.

In the case of waste land in an estate, which used to be usually submerged in water in the rainy season and not under cultivation at all, S. 163 of the Madras Estates Land Act does not apply and the Civil Courts have jurisdiction to grant mesne profits. The fact that such land can at times be cultivated with labour and expenditure of money does not make it ryoti land within the meaning of the Act.

Second appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore in A. S. No. 388 of 1920, preferred against the decree of the Court of the Principal District Munsif of Tanuku in O. S. No. 371 of 1916.

K. Kamanna for appellant.

T. Ramachandra Rao for respondent.

The Court delivered the following

JUDGMENT :—In this case the point taken before me is that Civil Courts have no jurisdiction to grant mesne profits in the way the lower Courts have done as the plaintiff is entitled only to such profits as can be claimed under cl. 2 of S. 163 of the Madras Estates Land Act under which mesne profits have to be ascertained by the Collector under S. 45, and reliance is placed upon the ruling in *Kotikalapudi Kattayya* v. *Sree Rajah Venkataramayya Row Bahadur* (1). If the land in question were ryoti land the argument may be sound, but the finding of both the lower Courts is that this land is not ryoti land because it is not ordinarily cultivable. The learned appellate Judge says that it is a sort of waste land usually submerged in water in the rainy season and not under cultivation at all. On that finding S. 163 will not apply and

*S. A. No. 1105 of 1921. 19th February, 1924.

1. (1920) 39 M L J 571.

Subbayya v. Sree Raja Venkataramiah Apparao Bahadur.

there will be no ground for objecting to the Civil Courts ascertaining the mesne profits due. It is, however, contended before me that as the land has been actually cultivated by the appellant for some years, it must be taken to be cultivable land, being in a zamindari estate, it must be treated as a ryoti land and the finding to the contrary by the District Judge should not be accepted. Ryoti land is defined in the Estates Land Act as meaning cultivable land in an estate other than private land but does not include tank beds, thrashing floors, etc. It certainly does not include waste land where no cultivation is ordinarily carried on. In S. 6, cl. 4, waste land and grazing land are treated as lands in which a person cannot get permanent rights of occupancy. This has been pointed out by the learned Judges in *Rajah of Venkatagiri* v. *Ayyappa Reddi* (2) their observations are found at pages 740 and 741. When the definition of ryoti land speaks of cultivable land, it seems to me that it means land that is ordinarily and usually cultivated and does not refer to waste land though even waste land can at times be cultivated with labour and expenditure of money. I think that the finding of the lower Court that this land is not ryoti land is correct.

The second appeal fails and is dismissed with costs.

T. S. V *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

The Public Prosecutor *Appellant**

v.

Varadarajulu Naidu *Accused (in S. T. R. No. 67 of 1923 on the file of the Second Class Bench Court, Salem).*

Public Prosecutor v. Varadarajulu Naidu.

Madras District Municipalities Act of 1920—S. 182—Powers of Municipal Council under—Wall not built upon public street—Removal of—Order for—Validity—Land encroached upon once a street, but accused in possession thereof for over statutory period—Removal of encroachment in such a case —Order for—Validity—Distinction—Accused's right in such a case—Law under Act IV of 1884 and under Act of 1920—Distinction.

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2. (1913) I L R 38 M 738 25 M L J 578.

*Cr Appeal No. 1032 of 1923. 20th March, 1924.

Public Prosecutor v. Varadarajulu Naidu.

The Chairman of a Municipal Council cannot under S. 182 of the District Municipalities Act of 1920, call upon the owner or occupier of any premises to remove a wall not built upon any part of a public street, and on his failing to do so get him convicted under S. 313 of the Act. The law is not that the Municipal Council can do this and that the relief to which the accused would be entitled is compensation mentioned in S. 182.

Where the wall constitutes an encroachment, but it is proved that the accused has been in possession of that part of the street which was encroached upon for over the statutory period, the Municipality will be justified in calling upon him to remove it, and he is bound to obey the order. Only in such a case he will be entitled to a reasonable compensation from the Municipal Council. Under the Act of 1920 if it is proved that the portion on which the encroachment exists was once a street the right of the Municipality follows as a necessary result.

38 M. 456, a decision on S. 168 of the repealed Act IV of 1884, is no authority on cases falling to be decided under the new Act.

Semble 38 M. 456 is not reconcilable with 38 M. 6.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Court of the Second Class Bench Magistrate of Salem in S. T. R. No. 67 of 1923 on his file.

The Public Prosecutor for the Crown.

T. M. Krishnaswami Aiyar for *V Ganapathi Aiyar* for accused.

The Court delivered the following

JUDGMENT :—This is an appeal by the Public Prosecutor against an order of acquittal made in the following circumstances :—The accused-respondent was directed under S. 182 *of the Madras District Municipalities Act,* 1920, by the Chairman of the Salem Municipal Council to remove an encroachment, it having been alleged that a compound-wall built by the accused in front of his house encroached upon a public street. The accused refused to comply with the order on the ground that there was no encroachment and thereupon he was prosecuted under S. 313 by the Municipal Council for having failed to comply with the requisition lawfully made in pursuance of the provisions of the Act. The accused was tried by a Bench of Magistrates and they found that the wall was not built upon a part of the public street, that the portion occupied by the wall never formed a part of the street and that therefore there was no encroachment. On this finding of fact the order of acquittal was clearly justified. It is, however, faintly suggested by the learned Public Prosecutor that S. 182 gives the Municipal Council power of compulsory acquisition, that is to say, that although the wall in question was not built upon any

Public Prosecutor v. Varadarajulu Naidu.

part of a public street still the Municipality could call upon the accused to remove the wall and on his failing to do so get him convicted and that the relief to which the accused would be entitled is compensation mentioned in the section.

S. 182, so far as it is relevant for the present purpose, is as follows :—

> "1. The Chairman may by notice require the owner of any premises to remove or alter any projection, encroachment or obstruction situated against in front of such premises and in or over any street."
>
> If the owner.......of the premises proves that any such projection, encroachment or obstruction has existed for a period sufficient under the Law of Limitation to give any person a prescriptive title thereto or the Municipal Council shall make reasonable compensation to every person who suffers damage by the removal or alteration of the same."

It is quite obvious that the object of the section is not to empower the Municipality to compulsorily acquire a private property but its scope is limited to authorising the Municipal body in public interest to cause obstructions and encroachments to be removed.

I have no hesitation in rejecting the argument as utterly untenable. Indeed, the learned Public Prosecutor was quite conscious of the weakness of his contention, and merely desired to have a ruling upon the point.

There is however another portion of the judgment of the Magistrates which calls for more serious consideration. I have said that they gave a finding that no part of the wall was built upon any portion of the public street. The Magistrates, however, proceeded to say that if the wall constituted an encroachment, the accused has been in possession of that part of the street which was encroached upon for over the statutory period and that therefore the action of the Municipality was not justified.

In this the Magistrates were clearly wrong. The decision is in the teeth of the express words of the section which enacts that if the owner succeeds in proving that the encroachment has existed for a period sufficient under the Law of Limitation to give him a prescriptive title thereto, he is all the same bound to comply with that order, but in that event he will be entitled to a reasonable compensation from the Municipal Council.

Public Prosecutor v. Varadarajulu Naidu.

Mr. T. M. Krishnaswami Aiyar, the learned Vakil for the accused, relied upon the *Chairman, Municipal Council, Srirangam* v. *Subba Pandithar* (1). The learned Judge held in it that if the owner acquired title by adverse possession to the site occupied by the encroachment or obstruction, the whole of such space ceases to be a street and what was originally an encroachment can no longer be described as such and that therefore the Municipality will not be justified in requiring its removal. But it must be remembered that this is a decision on S. 168 of the repealed Act IV of 1884. It runs thus :—

"1. The Municipal Council may cause any projection, encroachment or obstruction made against or in front of any building or land in any public street to be removed or altered as they think fit.

"2. The Municipal Council shall give notice of such intended removal or alteration to the owner or occupier of the building or land against or in front of which such projection, encroachment or obstruction has been made thirty days before such alteration or removal is begun.

"3. If such projection, encroachment or obstruction shall have been lawfully made the Municipal Council shall make reasonable compensation to every person who suffers damage by such removal or alteration."

Whatever doubts may be entertained in regard to the old section they have been removed by the very clear and express language of the section in the new Act. For the purposes of the present section what is once an encroachment or an obstruction always remains so. If it is proved that the portion on which the encroachment exists was once a street the right of the Municipality follows as a necessary result. I am therefore of the opinion that *The Chairman, Municipal Council, Srirangam* v. *Subba Pandithar* (1) is not an authority that bears on the present question. The learned Public Prosecutor relied upon *Basaveswara Swami* v. *The Bellary Municipal Council* (2) as establishing the proposition the very reverse of what was held in *The Chairman, Municipal Council, Srirangam* v. *Subba Pandithar* (1). Sadasiva Aiyar, J. was a party to both the decisions and though in the later judgment he was at pains to reconcile it with his earlier judgment, it seems to me that the cases are irreconcilable. In *Basaveswara Swami* v. *The Bellary Municipal Council* (2) the question arose with reference to a projection overhanging a street. In the later case, *The Chairman, Municipal Council, Srirangam* v. *Subba Pandithar* (1), the projection rested on the soil of the street itself. In either case by adverse possession the title of the

1. (1913) I L R 38 M 456 : 25 M L J 297.

2. (1912) I L R 38 M 6 : 23 M L J 479.

Public Prosecutor v. Varadarajulu Naidu.

possessor becomes complete. When the projection overhangs the street, he acquires title to the space occupied by the projection. Where the projection on the other hand rests upon the soil, he acquires title to the site on which the obstruction stands.

Corbett v. *Hill* (3) is a useful and instructive case. The plaintiff and the defendant in it were owners of two contiguous houses. One of the first-floor rooms in the plaintiff's house projected over the ground-site of the defendant's house. The defendant proceeded to erect a building over the said room belonging to the plaintiff and protruding over the site of the defendant's house. The question was whether the space over the projecting room belonged to the plaintiff or the defendant. The learned Vice-Chancellor, Sir W. M. James, held that it belonged to the defendant. He says that the ordinary rule of law is that whoever has got the *solum*—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth. But that presumption of law is rebutted by the fact that other adjoining tenements protrude themselves over the site. Then the question arises, is the owner of the soil deprived of the entire right including the right upwards and downwards as is defined horizontally by a section of the protrusion or is he deprived of that portion only as is included between the ceiling of the room at the top and the floor at the bottom ? The protrusion, the learned Vice-Chancellor answers, does not carry with it anything above it or anything below. The owner of the site remains the owner of everything else, that is the vertical column of air, in other words, the space above and below the protrusion or the projection overhanging the site.

Applying this principle to the facts of *Basaveswara Swami* v. *Bellary Municipal Council* (2) the owner acquired by adverse possession title to the space covered by the projection and to that extent the street lost its character of a street and similarly in *The Chairman, Municipal Council, Srirangam* v *Subba Pandithar* (1) the owner acquired title to the site on which the projection rested and that part of the site ceased to be a street. In the earlier case, *Basaveswara Swami* v. *Bellary Municipal Council* (2) the learned Judges, Sundara Aiyar and

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1. (1913) I L R 38 M 456 · 25 M L J 297.
2. (1912) I L R 38 M 6 : 23 M L J 479.
3. (1870) L R 9 Eq. Cases, 671.

Sadasiva Aiyar, JJ., decided in favour of the Municipality and in the later case, *The Chairman, Municipal Council, Srirangam* v. *Subba Pandithar* (1) the learned Judges, Sadasiva Aiyar and Tyabji, JJ., decided against the Municipality. With all respect it seems to me that the decisions in the two cases are at variance with each other.

Public Prosecutor v. Varadarajulu Naidu.

But for my present purpose it is unnecessary to pursue this point, We are now governed by an altogether new Act and the words in the section in question leave no room for doubt. I therefore hold that the decision of the Bench of Magistrates on the second question is wrong.

The order of acquittal was however rightly passed and in the result the appeal fails.

I would like to add that it is extremely undesirable that cases of this description involving difficult questions of fact or of law should be directed to be tried by a Bench of Honorary Magistrates. They cannot ordinarily be expected to deal satisfactorily with the questions that are involved in such cases and I have had not a little amount of difficulty in understanding the judgment in the present case.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Jagannadha Reddiar *Petitioner* (2nd Defendant)*

v.

Lakshmana Reddiar *Respondent (Plaintiff)*

Jagannadha Reddiar v. Lakshmana Reddiar.

Negotiable instrument—Promissory note—Suit by endorsee against maker and endorser—Liability of—Presentation for payment—Notice of dishonour—Cause of action—Limitation—Payment of portion of amount by maker—Effect.

The liability of the endorser of a promissory note arises out of the indorsement and not on the note. A payment of money by the maker, endorsed on the note and signed by him saves limitation only against the persons liable on the note and has nothing to do with persons liable on the endorsement. In order to make the endorser liable, it must be presented for payment within a reasonable time after the indorsement and it is not in the option of the indorsee by waiting for an unreasonable length of time to postpone the cause of action. Notice of dishonour should also be given within a reasonable time after dishonour.

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1. (1913) I L R 38 M 456 : 25 M L J 297.

*C R P No. 160 of 1923. 25th April, 1924.

Jagannadha Reddiar v. Lakshmana Reddiar.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Chingleput in S. C. S. No. 724 of 1921.

A. Ramakrishna Aiyar for petitioner.

S. Muthiah Mudaliar for respondent.

The Court delivered the following

JUDGMENT :—This revision petition arises out of a suit on a negotiable promissory-note (dated 24th December, 1915) payable on demand by the endorsee of the note against the maker (1st defendant) and the endorser (2nd defendant). The Subordinate Judge gave a decree against both the defendants.

The 2nd defendant filed this petition. In his written statement, he raised the question of limitation. The second point for determination stated by the Subordinate Judge is whether the 2nd defendant is liable. I presume that it was intended to include the question of limitation also, though the Subordinate Judge has not discussed it.

The liability of the 2nd defendant arises out of the indorsement and not on the note. The cause of action against him cannot arise earlier than the indorsement (dated 19th March, 1918). A payment of one rupee by the 1st defendant was endorsed on it and signed by the 1st defendant on 20th December, 1918. This saves limitation as against persons liable on the note and has nothing to do with persons liable on the indorsement. The suit is filed on 20th December, 1921. If the cause of action arises before 20th December, 1918, the suit is barred by limitation.

The extent and nature of the liability of the endorser of note payable on demand is not governed by S. 35 of the Negotiable Instruments Act. We have to deal with the case of a note payable on demand which has been negotiated by indorsement before it is overdue and has been dishonoured. [*Sivaramakrishna Pattar* v. *Moideen Musaliar* (1)]. According to S. 86 of the Bills of Exchange Act " Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it is not presented, the endorser is discharged." The law in

1. (1909) I L R 33 M 34 : 19 M L J 509

India must be, by analogy, (1) to the same effect, or (2) subject to a contract to the contrary, or (3) the indorser is not liable at all. Taking the most lenient view in favour of the plaintiff, in this case, the note can be regarded as presented for payment only on 20th December, 1918, when one rupee was paid by the 1st defendant and not earlier. It cannot be said that it was presented within a reasonable time after the indorsement. I do not think it should be in the option of the indorsee by waiting for an unreasonable length of time to postpone the cause of action as he likes. Notice of dishonour is also necessary as a condition precedent to the liability of the 2nd defendant, (S. 93) and it also ought to be sent within a reasonable time. (*See* S. 94 and Ss. 105 and 106 of the Negotiable Instruments Act). It is admitted that the notice of dishonour was given to the 2nd defendant only just before suit. The plaintiff cannot be in a better position than if he presented the note for payment within a reasonable time after indorsement and gave notice of dishonour within a reasonable time after dishonour.

I find the suit is barred by limitation as against the 2nd defendant and I doubt if he is liable at all. The Revision Petition is allowed and the suit is dismissed with costs throughout against the 2nd defendant. The decree against the 1st defendant will stand.

T. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Kuppakkal (died) *Appellant** (*1st Defendant* & *L.R.*)
K. Ponnuswami Chetty, L. R. of the deceased appellant—(*vide* Order, dated 8th March, 1922, on C. M. P. No. 641 of 1922)

v.

Mathan Chettiar and others *Respondents* (*Plaintiffs and Defendants Nos.* 2 *and* 3)

Kuppakkal v. Mathan Chettiar.

Deed—Construction—Sale of building sites—Intended pathway—Rights of vendees.

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*S. A. No. 1176 of 1921. 6th March, 1924.

Kuppakkal
v.
Mathan
Chettiar.

The owner of a block of vacant land sold a portion thereof as a building site to A. In the conveyance in favour of A the parcel of land sold to him was described as bounded on its southern side by a pathway intended to be set apart by the vendor. Shortly after the sale to A., the vendor conveyed the remainder of the block including the site of the intended pathway to B., who refused to allow A a right of way over his land. *Held,* that A was entitled to a right of way on B's land along the intended pathway and that neither the vendor nor anybody claiming under him could dispute A's right of way.

Espley v. *Wilkes,* (1872) L R 7 Ex. 298 relied on.

Second Appeal against the decree of the District Court of Coimbatore in Appeal Suit No. 92 of 1921 preferred against the decree of the Court of the District Munsif of Tirupur in Original Suit No. 918 of 1919.

T R. Venkatarama Sastri and *C. V Mahadeva Aiyar* for appellant.

A. Krishnaswami Aiyar and *K. V Ramachandra Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—One Rangaswami Chetty sold to the 1st defendant under Ex. I, dated 26th June, 1917, a strip of land about 102 feet long and 21 feet wide having a frontage on a public road out of a large block of building vacant site of which he was the owner. The portion purchased by the 1st defendant I shall call site No. A. The land exclusive of site No. A may, for the purposes of this appeal, be regarded as consisting of two parts : (1) The portion south of and contiguous to what was sold to the 1st defendant opening also on the public road (this I shall call site No. B) ; and (2) the bulk of the property at the back of the site No. A and the site No. B to which access from the road was over the said site No. B (this I shall call site No. C).

Three days subsequent to the sale of site No. A Rangaswami Chetty sold the remainder of the block, sites Nos. B and C, to certain persons from whom the present plaintiffs derive title. On the site No. C the plaintiffs constructed a ginning factory. The 1st defendant, to start with, built a small house facing the road on her own site, site No. A, leaving the rest of her land at the back of her house as an open space. She then built another house on the vacant land and as it has no frontage on the road, she claimed a right of way over the site No. B.

Kuppakkal v Mathan Chettiar.

The short question to be decided is, whether she is entitled to this right of way? The basis of her claim is the fact that in the sale deed executed in her favour the southern boundary of the site conveyed to her is described to be "pathway 18 feet in breadth which I am going to set apart." The lower Courts having negatived her right, she has preferred this second appeal. It is found that there were negotiations at the same time in regard to the sale to the 1st defendant as well as to the plaintiff's predecessors in title. Whether the 1st defendant has acquired the right she claims depends entirely upon the construction of the conveyance in her favour. In regard to the surrounding circumstances, two facts seem, in my opinion, to be of outstanding importance. (1) The land sold to the 1st defendant was about 102 to 105 feet in length and it was vacant building land. It was not to be expected that the 1st defendant would only build one house upon it. If more than one house was to be built, the access to the house at the back of the first house would naturally be over the site No. B. (2) The sites B and C were not laid out in building plots, but on the contrary they were regarded as forming one block to be conveyed to one purchaser. That being so, there was no significance in describing site B as an intended pathway unless it was a pathway intended also for the use of the 1st defendant.

These two circumstances strongly support the 1st defendant's case. On a construction of the words relied on I am of the opinion that her contention must prevail. In *Espley* v. *Wilkes* (1), Kelly, C. B., quotes with approval the following observations of Mansfield, C. J., in *Roberts* v. *Karr* (2) :—

"If you (the lessor) have told me in your lease this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road."

In the same case the observations of Lawrence, J. are also cited :—

"If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises ?" The facts of *Espley* v. *Wilkes* (1) are these The plaintiff demised by a lease under which the defendant claimed "All that plot of land bounded on the east and north by the newly made streets a plan whereof is indorsed on these presents." On the indorsed

1. (1872) L R 7 Ex 298. 2. 1 Taunt 495 (127 E R 926).

Kuppakkal
v
Mathan
Chettiar.

plan the site of the new street was shown and was marked as "new streets." The lease contained covenants by the lessee to build two houses on the land. The plaintiff afterwards granted to the plaintiff a lease of the land comprised in the site of the one of the proposed new streets and the plaintiff inclosed the land so that the defendant was unable to reach the east side of his premises. In an action against the defendant for pulling down this obstruction, it was held that under the defendant's lease a right of way was granted along the site of the proposed new streets to his premises. Kelly, C. B. observed that the grantor was estopped from denying that the strips of land, his property, were what he described them to be, that is to say, "streets" which they could not be unless there is a way through and along them. In *Roberts* v. *Karr* (2) which is referred to in *Espley* v. *Wilkes* (1) it was held that the grantor and those claiming from him were concluded from preventing the grantee to come out into the road over the strip of land then in question.

In *Furness Railway Company* v. *Cumberland Co-operative Guilding Society* (3) the land which was conveyed was at the date of the conveyance waste building land on the outskirts of town. The plan showed C and M streets. The site of the intended streets was the property of the vendor. It was held that the conveyance granted to the purchaser a right of way.

In *Gogarty* v. *Horkins* (4) of the two plots demised to the lessee, plot A was described as bounded on the east by "an intended road to be 38 feet wide intersecting the said lot from lot B," and lot B was described as being bounded on the west "by the said intended road 38 feet wide intersecting the said lot from lot A." Upon the map annexed to the lease the aforesaid intersecting passage was delineated as being 38 feet wide and was described as "the proposed new road reserved by" the lessor. It was held that from the words of the lease there was to be implied a grant of an easement of way across the intersecting space. *Harding* v. *Wilson* (5) is an old case which is somewhat inconsistent with the rulings referred to above. But its authority has been doubted both in *Furness Railway Company* v. *Cumberland Co-operative Guilding Society* (3) and *Gogarty* v. *Horkins* (4). I have there-

1. (1872) L R 7 Ex. 298.
2. 1 Taunt 495 (127 E R 926).
3. 52 L T R 144 (H L).
4. (1906) 1 I R 173.
5. 2 Bar & Cress 96 (107 E R 319).

Kuppakkal v. Mathan Chettiar.

fore come to the conclusion that the 1st defendant ought to succeed. The plaintiffs propose to construct a wall on both sides of the pathway. This they cannot do. They cannot have an injunction restraining the 1st defendant from resisting the construction of this wall. In the plaint it is said that the 1st defendant has been tying her cattle in the pathway and placing tubs and pots on the way and committing several acts of nuisance. It is clear that the 1st defendant cannot use the pathway for these purposes. Subject to this reservation the plaintiff's suit must fail.

The Second Appeal is allowed with costs throughout.

A. V. V. *Second Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Somu Pillai *Petitioner* (Complainant)*

v.

Krishna Pillai *Respondent (Accused).*

Somu Pillai v. Krishna Pillai.

Criminal Procedure Code, S. 520—District Sessions Judge—If a Court of appeal, confirmation, reference or revision—Order of Second Class Magistrate—Appeal to Sub-divisional Magistrate—Order if can be varied by Sessions Judge.

In a case of theft, a Second Class Magistrate convicted the accused and directed the subject-matter to be handed over to the complainant. On appeal the Sub-divisional Magistrate acquitted the accused but declined to interfere with the order directing return of the property. The Sessions Judge on appeal directed the subject-matter of the offence to be handed over to the accused. *Held,* the order of the Sessions Judge was unauthorised by S. 520 or any other section of the Criminal Procedure Code as he was not a Court of appeal, confirmation, reference or revision with respect to the orders of the Second Class Magistrate or Sub-divisional Magistrate.

Petition under Ss. 435, 439 and 520 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of 30th October, 1923 of the Sessions Court of South Arcot in Cr. M. P. No. 19 of 1923, preferred against the Order, dated 1st February, 1923, of the Court of the Sub-divisional First Class Magistrate of Chidambaram in Criminal Appeal No. 57 of 1923.

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*Cr R C No. 881 of 1923
(Cr R P No. 707 of 1923). 25th April, 1924.

K. V Krishnaswami Aiyar for *S. Panchapagesa Aiyar* for petitioner.

V L. Ethiraj for *K. S. Jayarama Aiyar* for respondent.

The Court made the following

ORDER :—This is an application to revise the order of the Sessions Judge of South Arcot in Criminal Miscellaneous Petition No.19 of 1923. The complainant, Somu Pillai, brought a case of theft of bulls against the accused in the Court of the Second Class Magistrate of Chidambaram Taluq. The Sub-Magistrate convicted the accused and directed the bulls to be handed over to the complainant. The accused appealed to the Sub-divisional Magistrate of Chidambaram who acquitted the accused and declined to interfere with the order of the Sub-Magistrate regarding the bulls. Against this order of the Deputy Magistrate an appeal was preferred to the Sessions Judge of South Arcot Division, who set aside the order of the Divisional Magistrate and directed the bulls to be handed over to the accused. It is urged before me that the Sessions Judge had no power under S. 520 to vary the order of the Sub-divisional Magistrate. S. 520 is in these terms :— "Any Court of appeal, confirmation, reference or revision may direct any order under S. 517, S. 518 or S. 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just." The Court of Sessions of South Arcot is not a Court of Appeal so far as the order of the Second Class Magistrate is concerned. Appeals from the decisions of Second Class Magistrate lie to the District Magistrate and to Sub-divisional Magistrate who are empowered to hear appeals from Second Class Magistrate. So the Sessions Court is not a Court of Appeal so far as the Stationary Magistrate is concerned. It cannot be said to be a Court of Appeal in respect of the order by the Sub-divisional Magistrate. The Sub-divisional Magistrate heard the appeal from the decision of the Second Class Magistrate, and no second appeal lay to the Court of Sessions against the order of the Sub-divisional Magistrate. The Sessions Court is not a Court of confirmation in cases of this kind. It was feebly urged by Mr. Ethiraj that the Sessions Court may be called a Court of reference. I think, a Court of reference means a Court to which references are made and which on references

Semu Pillai *v.* Krishna Pillai.

are entitled to go into the matters and dispose of them. The High Court is a Court of reference in jury cases where the Judge differs from the jury. The Sessions Court is not a Court of revision so far as the judgment of the Second Class Magistrate are concerned and the Sessions Court has no revisional powers over the orders of a Divisional First Class Magistrate in appeal cases. S. 520 has therefore no application to the Sessions Court in cases like this. This point came up for decision in Criminal Case No. 236 of 1904 before a Bench of this Court. In that case the Second Class Magistrate convicted the accused and directed the property to be taken possession of by the Forest Officer. This order was made under S. 44 of the Madras Forest Act. On appeal the First Class Magistrate reversed the order of the Second Class Magistrate and acquitted the accused under S. 47 of the Madras Forest Act and made the order which the Sessions Judge took upon himself to revise. The learned Judges held that the Sessions Court was not a Court of appeal, etc., in those circumstances from the First Class Magistrate, and had no jurisdiction to revise the order. I hold that the order of the Sessions Judge is not authorised by S. 520 or any other section of the Criminal Procedure Code. I set aside the order of the Sessions Judge and direct that the order of the Sub-divisional Magistrate of Chidambaram be given effect to.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Mahaboob Sir Frajvantu Sree Rajah Parthasaradhi Appa Row Savayi Aswa Row Bahadur Zamindar Garu *Appellant* (Pltff.)*

v.

Turlapati Subba Row and others *Respondents (Defendants 1 and 3 to 5).*

Sree Rajah Partha-saradhi Appa Row *v.* Turlapati Subba Row.

Limitation Act, Art. 89—Pleader and client—Death of pleader—Suit for accounts against sons—Agency—Cause of action—Pleader if general agent.

The plaintiff employed the father of the defendants as his Vakil in a number of revenue suits. Within three years of the death of the father, he

*S A No. 96 of 1923. 2nd April, 1924.

Sree Rajah Parthasaradhi Appa Row v. Turlapati Subba Row.

filed a suit against the sons for an account of their father's agency. *Held,* on a construction of the order of appointment, it was not a case of general agency, but an agency in respect of each individual suit. *Saffoon Waldon Second Benefit Building Society* v. *Raynir,* (1880) 14 Ch D 406 followed.

Held, also in such a case the cause of action against the legal representatives of the agent is not different from that against the agent and at any rate in cases where the cause of action had accrued before the agent's death, the mere fact of his death would not give a fresh starting point of limitation against the sons. The suit would be governed by Art. 89, Limitation Act, and the claim in respect of the revenue suits the proceedings in which terminated more than three years before the present suit was barred. *Arunachalam Chetty* v. *Raman Chetty,* (1914) 16 M L T 614 followed.

Second Appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore in Appeal Suit No. 65 of 1922 preferred against the decree of the Court of the Additional District Munsif of Ellore in O. S. No. 204 of 1921.

P. Venkataramana Rao for appellant.

V Suryanarayana for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff in this case employed one Sobhanadri, father of the defendants, as his vakil in revenue suits, and he has now brought the present suit after Sobhanadri's death against defendants as legal representatives for an account of their father's agency. The learned Subordinate Judge has found that Sobhanadri acted as plaintiff's agent in each of the suits in which he appeared as vakil and has held that the plaintiff's claim is barred except in respect of suits the proceedings in which terminated less than three years before the suit.

The first point taken in appeal is that the Subordinate Judge is wrong in treating Sobhanadri's agency as being an agency in respect of each of the suits, and it is argued that he was a general agent for the plaintiff in respect of all revenue litigation. The order appointing him is Exhibit B (2) under which he was appointed by the plaintiff to conduct revenue suits in the District Munsif's Courts and before revenue officers, but this document does not in itself constitute Sobhanadri as agent, for Sobhanadri could not appear as such agent without a vakalat in each suit. It was an appointment as standing vakil, and until a vakalat was given to the vakil there was no agency distinctly constituted. There was no contract which bound him to appear in each and every suit, nor was there any contract binding the plaintiff to appoint him in every suit, and it is in

Sree Rajah Parthasaradhi Appa Row v. Turlapati Subba Row.

evidence that the plaintiff employed several other vakils for similar litigation. There can, therefore, be no question of general agency, but the agency was merely in respect of each individual suit. In this connection I may refer to *Saffoon Waldon Second Benefit Building Society* v. *Raynir* (1), where it was sought to treat a solicitor who was appointed for trustees as agent of those trustees in receiving a notice and I would quote a passage at page 415, " As Lord Justice James said, there is no such thing as a standing relation of a solicitor to a man A solicitor does not stand in a permanent relation to his client as a chaplain does to a nobleman or body having a chaplain A man is a solicitor for another only when that other has occasion to employ him as such. That employment may be either to conduct a suit or to advise him about some matter in which legal advice is required but there is no such general relationship as that of solicitor and client of a standing and permanent character upon all occasions and for all purposes." These remarks are in my opinion strictly applicable to the present case if we merely substitute the word " pleader" for "solicitor. The Subordinate Judge was therefore right in rejecting the plea that the agency was one and indivisible.

The next question relates to the period of limitation and it is argued that the plaintiff having come into Court within three years of the death of defendants' father his suit is within time as regards all the agencies. Reliance is placed on several cases in the Allahabad and Calcutta Courts, *Kali Krishna Pal Chowdhry* v. *Srimati Jagattara* (2), *Bindraban Behari* v. *Jamuna Kunwar* (3) and *Rao Girraj Singh* v. *Rani Raghubir Kunwar* (4). In the first of these cases the agent died before his agency terminated and it was held that as against his legal representatives the article of limitation applicable was 120, but the question is not discussed in any detail. In *Bindraban Behari* v. *Jamuna Kunwar* (3) the plaintiff sued to recover a definite sum of money which was in his agent's hands and which he said passed to his legal representatives, the defendants in the suit. Here also it was held that Art. 120 was applicable. A similar case is the one reported in *Gurudas Pyne* v. *Ram Narain Sahu* (5) and these two cases were followed in *Rao Girraj Singh* v. *Rani Raghubir Kunwar* (4). It will be seen that in

1. (1880) 14 Ch D 406.
2. (1868) 2 Beng L R 139.
3. (1902) I L R 25 A 55.
4. (1909) I L R 31 A 429.
5. (1884) I L R 10 C 860 (P C).

Sree Rajah Parthasaradhi Appa Row v. Turlapati Subba Row.

none of these cases was there really a suit for an account, but they were suits to recover certain moneys in the agent's hands for which that agent was liable to account. It is true that the Courts seem to hold that the cause of action against the agent is a distinct cause of action from that against his legal representatives. This may possibly be based on the idea that the sons under Hindu Law are only liable for their father's debts after the father's death, but it is now well-settled law that a son's liability to pay his father's debts arises even before the death of the father and consequently their estate would be liable equally with their father's estate.

In *Jhapajhannessa Bibi* v. *Bama Sundari Choudhurani* (6) it was held that a suit for an account lies against the legal representatives of a deceased agent, but it was held that Art. 115 applied because "after the agent's death the law presumes that there is always an implied contract by which the heirs of the deceased agent are bound to give an account of whatever they may have received from the agent at the time of his death." It was held, therefore, that defendants committed a breach of this contract by not rendering accounts. But if an implied contract is the basis of the cause of action with all respect, it would appear to be the contract referred to in Art. 89, *i. e.*, that of an agent to render account. Art. 89 would then be applicable. In *Kumeda Charan Bala* v. *Ashutosh Chattopadhyaya* (7) it was held that a similar suit was really one to recover money misappropriated by the deceased agent, but the Article of Limitation applicable was not definitely decided. It is rather difficult to understand how the cause of action against the legal representatives is a different one to that against the agent and it appears to me that at any rate in cases where the cause of action had accrued before the agent's death the mere fact of his death would not give a fresh starting point of limitation against the sons and in this view I am supported by the decision of this Court in *Arunachalam Chetty* v. *Raman Chetty* (8). There Sankaran Nair, J., remarked as follows :—" It is then argued that though the claim against the father may be barred, it is not barred against the sons. This argument proceeds on the basis that the cause of action against the sons is different. The decisions are against the appellant. The defendants are sued as the representatives

6. (1912) 16 C W N 1042. 7. (1912) 17 C W N 5.
8. (1914) 16 M L T 614.

Sree Rajah Partha-saradhi Appa Row v. Turlapati Subba Row.

of their deceased father and as the suit would be barred against him if he had lived, it is also barred against the defendants." Spencer, J. also remarked, "There is no reason why Art. 120 of the Limitation Act should be applied to a suit brought against the representatives of a deceased agent when the Article applicable to a suit against the agent for acts committed during the continuance of his agency would be Art. 89 and limitation would run from the termination of his agency and the Article applicable in respect of money payable by him after the termination of his agency would be Art. 62."

This decision is binding on me and with all respect I agree with the views therein expressed, for I do not see how the mere fact that the father has died and that his assets have legally passed to his representatives can give the plaintiff any new cause of action against the defendants, unless it is alleged that defendant wilfully misappropriated a definite sum of money left by their father to be given to plaintiff. This being so, the cause of action accrued before the father died and consequently time having begun to run would expire at the same time whether the father had died or not. In this view the lower Court's decision is correct and this second appeal must be dismissed with costs.

T. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

Kuppuswami Goundan (minor) and others *Appellants** (*Plaintiffs*)

v.

Marimuthu Goundan—insolvent, by Official Receiver, Coimbatore and others *Respondents* 1 *to* 8 (*Defendants* 1 *to* 3 *and* 5 *to* 9).

Kuppuswami Goundan v. Marimuthu Goundan

Provincial Insolvency Act (*III of* 1907), *Ss.* 2 (*e*) *and* 16—*Joint Hindu family—Father and sons—Insolvency of father—What vests in Official Receiver—Property or power of disposal—Sons' right to impeach binding nature of debts—Adverse finding—Decree in favour of party*—Res judicata.

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*Appeal No. 139 of 1921. 22nd July, 1924.

Kuppuswami Goundan *v.* Marimuthu Goundan.

Where in a joint Hindu family consisting of a father and his sons, the father is adjudicated insolvent, what vests in the Official Receiver under S. 16 read along with S. 2 (*e*) of the Provincial Insolvency Act is the entire property inclusive of the shares of the sons therein and not merely the power of disposal which the father has under the Hindu Law. The vesting of the property is not dependent on the nature of the debts incurred or conditional on the debts being for a binding purpose. In a suit by the sons for partition after the father's adjudication, it is open to them to prove that the debts were for an illegal or immoral purpose and as such not binding on them. Case-law referred to.

Where a suit is dismissed against a defendant but the judgment contains a finding adverse to him, such finding does not operate as *res judicata*. *Midnapur Zamindari Company* v. *Naresh Narain Roy,* (1920) I L R 48 C 460 (P. C.) followed.

Per Srinivasa Aiyangar, J. :—The proper way of regarding the vesting so far as the sons are concerned would be to regard it as in the nature of a trust for the exercise of the father's power of disposal of the family property for his antecedent debts on the one hand and on the other for the ascertainment and delivery over to the sons of the remainder of the property, if any.

Quaere :—Whether the mere making of a vesting order by a Court as regards the father or other co-parcener does not bring about in law the status of division ?

Appeal against the decree of the Court of the First Additional Subordinate Judge of Coimbatore in O. S. No. 40 of 1919 (O. S. No. 24 of 1917 on the file of the Court of the Subordinate Judge of Coimbatore).

T R. Ramachandra Aiyar and *S Srinivasa Aiyar* for appellants.

T M. Krishnaswami Aiyar for respondents.

The Court delivered the following

Spencer, O. C. J.

JUDGMENTS :—*The Officiating Chief Justice* :—The two plaintiffs, who are minors represented by their mother, brought a suit to obtain a partition from their father, the 1st defendant. They made their father's step-mother (2nd defendant) and her daughter (3rd defendant) and their father's uncle (7th defendant) and two mortgagee-creditors of their father (4th and 5th defendants) and two mortgagee-creditors of 7th defendant (defendants 8 and 9) parties to the suit. The plaintiffs' father was adjudicated an insolvent on December 19, 1916, and this suit was instituted on 2nd March, 1917 after the 1st defendant had become an insolvent in law. The Subordinate Judge dismissed the suit on the ground that the suit was not maintainable after the plaintiffs' father had become insolvent. He refused to give the plaintiffs an opportunity of proving that the mortgage bonds in favour of de-

Kuppuswami Goundan v. Marimuthu Goundan.

Spencer, O. C. J.

fendants 4 and 5 were executed to secure debts not binding on the plaintiffs on account of the immorality of their father, on the ground that this matter was *res judicata* owing to the finding in the previous suits (O. S. Nos. 13 and 14 of 1917) on the file of the Sub-Court, Coimbatore, which were suits brought by these mortgagees as plaintiffs in which the Court found that the plaint debts had not been proved to be not binding on these plaintiffs, who were defendants 2 and 3 in those suits.

The first point argued in appeal is that the Subordinate Judge was wrong in regarding the decision in the prior suits as *res judicata*. It is clear from the judgment of the High Court in Appeal No. 356 of 1919 that the plaintiffs abandoned their rights to claim a mortgage decree against these defendants in those suits. The defendants against whom the suit had been dismissed had no right of appeal upon the finding as to the nature of the debts and therefore this question was not finally decided as between the opposing parties to the suit. The lower Court must therefore take the suit back on its file and decide Issue 1 upon such evidence as may be adduced on either side.

The main point upon which we have heard arguments in this appeal is, whether the whole estate, of which the 1st defendant was manager, vested in the Official Receiver upon the 1st defendant's adjudication as an insolvent. Mr. Ramachandra Aiyar tried to persuade us that it was a condition precedent to the Official Receiver exercising the father's power to sell the joint estate for the discharge of his debts that those debts should be neither illegal nor immoral. S. 16 of the Provincial Insolvency Act III of 1907 declares that upon the making of an order of adjudication the whole of the property of the insolvent shall vest in the Receiver and that during the pendency of the insolvency proceedings no creditor shall have any remedy against the person or property of the insolvent in respect of the debt or commence any suit or other legal proceedings except with the leave of the Court. S. 2, Cl. (*e*) defines "property" as including any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. Now there is nothing in these provisions to indicate that the vesting of the property will depend upon the nature of the debts. Therefore there is no condition precedent to the vesting of the property and it may be ascertained whether the debts were incurred for

Kuppuswami Goundan v. Marimuthu Goundan.

Spencer, O. C. J.

illegal or immoral purposes in proceedings either before or after the adjudication. The argument that what vests in the Official Receiver, where the interest of undivided members of a joint family is concerned, is not the property itself but only a power exercisable over that property is in my opinion not sound. The definition in S. 2 (*e*) corresponds to the provision in S. 266 of the Civil Procedure Code of 1882 (O. 21, R. 60 of the Civil Procedure Code of 1908) by which a creditor may attach in execution all saleable property over which the judgment-debtor has a disposing power which he may exercise for his own benefit. It has been laid down by a Full Bench in *Sellamuthu Servai, In re* (1) that an Official Assignee standing in the shoes of an insolvent father can alienate family property to pay his antecedent debts provided that those debts are not tainted with illegality or immorality. In *Official Assignee of Madras* v. *Ramachandra Aiyar* (2) a Bench of this Court, to which Schwabe, C. J. and Coutts Trotter, J. were parties, held that the interest of the sons does not vest in the Official Assignee by reason of the adjudication although it would be competent to him to deal with their shares if the debts of the insolvent were of such a nature as to be binding on their interest. At the hearing of that case, the learned Advocate-General conceded, (I think erroneously) that the sons' shares did not vest in the Official Assignee and their Lordships adopted what he conceded as being the correct law upon the point. But the decision is one under the Presidency Towns Insolvency Act, and having regard to the manner in which the case was disposed of, should not be treated as a ruling on a point which was not necessary for the decision of the case. So long ago as 1895 Subramania Aiyar, J. decided in *Rangayya Chetti* v. *Thanikachalla Mudali* (3) that after the making of a vesting order the Official Assignee had power to transfer not only the shares of the insolvent but also those of his co-parceners provided that the debts were shown to have been incurred for purposes binding upon them. This decision was followed in *Nunna Setti* v. *Chidaraboyina* (4), quoting the opinion of Latham, J. in *Fakirchand Motichand* v. *Motichand Hurruckchand* (5), although Bashyam Aiyangar, J. was inclined to treat the Official Assignee's powers as derived

1. (1923) I L R 47 M 87: 46 M L J 86. 2. (1922) I L R 46 M 54: 43 M L J 569.
3. (1895) I L R 19 M 74. 4. (1902) I L R 26 M 214.
5. (1883) I L R 7 B 438.

Kuppuswami Goundan v. Marimuthu Goundan.

Spencer, O. C. J.

from S. 30 of the Indian Insolvency Act, which deals with powers rather than from S. 7 which deals with property. A Full Bench of the Lahore Court has definitely decided upon this point in *Bihari Lal* v. *Sat Narain* (6) that on the insolvency of a Hindu father governed by Mitakshara Law not only his own interest in the joint family estate vests in the Official Assignee but also his sons' interests which must be treated as the property of the father so far as the Official Assignee is concerned. I am respectfully inclined to adopt that decision as a correct statement of the law. An unreported decision in C. M. A. No. 110 of 1919 by Krishnan, J. and myself was to the same effect, *viz.*, that the property which vested in the Receiver upon the adjudication of the judgment-debtor as an insolvent included all property over which he had a disposing power which he might exercise for his own benefit. I think that *Sanyasi Charan Mandal* v. *Asutosh Ghose* (7), which was quoted to us in the arguments, has no bearing on this question, as what was dealt with in that case was the power of a Receiver to deal with the interests of a minor who had not been adjudicated as an insolvent in a partnership property, upon which different considerations from those applying to co-parcenerships arise.

It is clear that the present suit is not barred by the adjudication of the 1st defendant as an insolvent and the lower Court should not have dismissed it on that ground. The plaintiffs may reasonably wish to protect themselves against the father contracting further debts on the security of the joint family property and their only means of protecting themselves is by becoming divided [vide *Sama Rao* v. *Vannaji Vapuji* (8)]. The suit must therefore be remanded for retrial on the issue relating to illegality or immorality of the debts incurred in favour of the 4th and 5th defendants and for declaring the plaintiffs separate from their father in status and for fixing the amount of the shares to which they are entitled. As the property has vested in the Official Receiver, it will be impossible to effect a division by metes and bounds until the administration of the estate is completed. The passing of the final decree must therefore be deferred pending the divest-

6. (1922) I L R 3 Lah 329. 7. (1914) I L R 42 C 225.
8. (1922) I L R 46 M 64 at 69 : 43 M L J 745.

Kuppuswami Goundan v. Marimuthu Goundan.

ment of the estate from the hands of the Official Receiver. The Official Receiver will get his costs of opposing this appeal out of the insolvent 1st defendant's estate. The costs of the other parties to the suit in the lower Court and in the appeal will abide and be provided for in the final decree.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree with my Lord the Officiating Chief Justice in the order made by him. Having regard, however, to the very important nature of the questions raised in this appeal, I feel constrained to add some observations of my own. The main question is whether on the adjudication of an undivided Hindu father what vests in the Official Receiver is only the power to dispose of the sons' shares for the satisfaction of debts which are neither illegal nor immoral or the entire property inclusive of the shares of the sons therein. The decision in *The Official Assignee of Madras* v. *Allu Ramachandra Aiyar and others* (2), though it related to an insolvency under the Presidency Towns Insolvency Act, proceeded on a construction and consideration of language identical in the Presidency Towns Insolvency Act and the Provincial Insolvency Act. It is true that the decision of the learned Judges seems to be based on the concession made by the learned Advocate-General at the very opening of his argument. It is also true that the definition of property contained in S. 2, Cl. (*e*) of the Act was not referred to or its effect on the question before the Court considered.

However, personally speaking, in view of the very definite statement of the law set out in the said judgment, I should have been disposed to consider the matter of sufficient importance to deem a reference to the Full Bench necessary in the matter. But in view of the intimation by my Lord the Officiating Chief Justice in a matter which is essentially one of etiquette, I felt bound not to disagree with his decision that it is not necessary to make any such reference.

The expression " Property over which or the profits of which any person has a disposing power which he may exercise for his own benefit " is by no means easy to construe. It cannot of course be said that a father who exercises the power of sale over the joint property in which his sons have also a vested interest for the payment of antecedent debts of his, is

2. (1922) I L R 46 M 54 43 M L J 569.

not exercising the power of sale for his own benefit because though primarily the benefit accruing from the sale is the creditors, still, the freedom from liability for a personal debt is undoubtedly benefit of the kind contemplated. But the power of sale possessed by the father under the Hindu Law is not an absolute power of sale, and it is possible to regard the power, as argued by Mr. T. R. Ramachandra Aiyar, the learned Vakil for the appellant, as conditional upon the existence of antecedent debts and the requisite that such debts should not have been contracted for illegal or immoral purposes.

Were the matter *res integra* one would have been inclined to avoid the monstrous result that the family estate including the sons' shares should vest in the Official Receiver or Assignee on the insolvency of the father by holding that the father's power being merely conditional, the vesting of the property in the Official Receiver or Assignee both in quantity and quality would only be such as to tantamount to a vesting merely of the bare power, as held in the case of *The Official Assignee of Madras* v. *Allu Ramachandra Aiyar and others* (2). But the expression " Property over which or the profits of which any person has a disposing power which he may exercise for his own benefit" was by no means new to the Indian Legislature and has been bodily copied from S. 266 of the Civil Procedure Code of 1882.

Remembering that the Provincial Law of Insolvency is a development of the old Law of Civil Procedure, it seems to me that we are bound to construe that expression in the same manner as it has been construed by Courts in India for a long time beginning at any rate with the case of *Jagabhai Lalubhai* v. *Bhukhandoss Jagjivandoss* (9). That case and the numerous cases that followed it have proceeded on the basis that the power of a father to dispose of his sons' shares also, for the payment of his debts was not in the nature of a latent power which came into existence on the coming into existence of certain conditions precedent but a potential power over the entire property exercisable by him validly subject only to the sons successfully questioning the same in proper proceedings.

It is therefore impossible to hold that when the property of the insolvent is said to vest in the Court or the Official

2. (1922) I L R 46 M 54 · 43 M L J 569. 9. (1886) I L R 11 B 37.

Receiver and property is defined to include all property over which the insolvent has a disposing power what so vests is not the entire property itself inclusive of the shares of the sons therein but only the power of disposal which a father has.

There would also be enormous difficulties of a practical nature in holding that the power of a father is only a conditional power and that the vesting is contingent upon or proportionate to the debts of the father which are neither illegal nor immoral. But though the entire property inclusive of the shares of the sons vests in the Official Receiver or Assignee, it is clear that it so vests for the purpose of enabling him to exercise the power of sale which the father had of disposing of the property for the discharge of debts of an unobjectionable character, and it follows therefrom that the sons can in proper proceedings require to have it determined in respect of which debts such power can be exercised and in respect of which not. And it also follows that the sons can in proper time require that what is left over after the administration of the insolvent's estate and the due exercise of the powers by the Official Receiver or Assignee should be made over to them.

The proper way, it seems to me, of regarding the vesting so far as the sons are concerned would be to regard it as in the nature of a trust for the exercise of the father's power of disposal of the family property for his antecedent debts on the one hand and on the other for the ascertainment and delivery over to the sons of the remainder of the property, if any.

I am not at all sure whether it ought not to be held that on the mere making of a vesting order by a Court as regards the father or as for that matter another co-parcener of the joint family the indeterminate share possessed by the co-parcener becoming defined and definite there is not brought about in law a status of partition between him on the one hand and the other co-parceners on the other. However that may be there can be no doubt at any rate that the sons are at least entitled to have the status of division declared and further to have their rights to the residue of the property, if any, ascertained, declared and decreed. The lower Court was therefore wrong in dismissing the plaintiffs' suit entirely on the mere ground that the plaintiffs' shares became vested in the Official Receiver and that therefore the plaintiffs had no cause of action whatever.

As regards the other question, namely, whether the finding in the previous suit by the creditors that the debts were neither illegal nor immoral operates as *res judicata* in the present suit, I agree that it is not a case in which the rule of *res judicata* applies. In the case of *Midnapur Zamindari Company, Ltd.* v. *Naresh Narain Roy* (10) their Lordships of the Judicial Committee held that the finding against the occupancy right claimed by tenants in a suit against them which was dismissed as premature should not operate as *res judicata* in a subsequent suit, and the ground of decision is that in the former suit the tenants had no occasion to go further as to the finding against them.

If it should be necessary to bring the case within the terms of S. 11, Civil Procedure Code, I should be disposed to regard it not as a case in which there has been no final decision but as a case in which the issue was not substantially in issue between the parties in the previous suit for the reason that though directly and substantially in issue at one stage it ceased to be substantially in issue on the finding of the Court with regard to another issue which was sufficient to dispose of the case.

I therefore agree that the appeal should be allowed and that the plaintiffs' suit should be restored and remanded on the terms set out in the judgment of my Lord the Officiating Chief Justice.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice* AND MR. JUSTICE RAMESAM.

Thilla Rukmani Ammal *Appellant** (*Petitioner*).

v.

K. T. A. B. Rajagopala Iyer and others *Respondents* (*Respondents* 1 *to* 6).

Rukmani Ammal v. Rajagopla Iyer.

Provincial Insolvency Act (*V of* 1920), *S.* 9—*Deed of arrangement—Assent of creditor—Effect—If deed can be relied on as act of insolvency.*

A creditor who is a consenting party to a deed of arrangement executed by the debtor for the benefit of all the creditors cannot rely on the deed as an act

10. (1920) I L R 48 C 460 (P C).

*A. A. O. No. 312 of 1922. 29th July, 1924.

Rukmani Ammal v. Rajagopala Iyer.

of insolvency and apply for adjudication on the basis of the same. English statute law and case-law referred to.

Appeal against the order of the District Court of West Tanjore at Tanjore, dated the 4th September, 1922, in I. P. No. 6 of 1922.

A. Krishnaswami Aiyar for appellant.

R. Kuppuswami Aiyar, T. M. Krishnaswamy Aiyar for *T. Narasimha Aiyangar, K. Narasimha Aiyangar* and *R. Jagannatha Aiyangar* for respondents.

The Judgment of the Court was delivered by

Ramesam, J.

RAMESAM, J.:—This appeal under S. 75 of the Provincial Insolvency Act arises out of a petition by a creditor to adjudge the 1st respondent an insolvent. The learned District Judge found that the petitioner was a consenting party to the deed of arrangement executed on 3rd December, 1921, (Ex. I) for the benefit of all the creditors and on this ground she was disentitled from filing this petition and dismissed it. The petitioner appeals.

On the evidence we have no hesitation in finding that the petitioner was a consenting party to the deed. She is a markswoman but there is evidence to show that she was present and put her mark along with that of another lady. The petitioner is the aunt of the 1st respondent who still lives in her house and it seems to be probable that the petition has been filed in collusion with him.

The question of law argued for the appellant is that there is a difference between the law in England and in India on the question of the disability of a creditor who assented to a deed of arrangement. The contention of Mr. Krishnaswami Iyer is that when S. 9 of the Provincial Insolvency Act now in force (V of 1920) was enacted, the Indian Legislature had before it, the English Act of 1914, but did not choose to enact the clause relating to deeds of arrangement towards the end of sub-section (1) of S. 4.

The right of the creditor to apply for adjudication was dealt with in S. 6 of the Bankruptcy Act of 1883. That section has been adopted by the Indian Legislature as S. 6(4) of the Indian Act III of 1907. The English Consolidating Act of 1914 was then enacted with the additional clause relating to deeds of arrangement after S. 4 (1) (*d*). The Indian Act of 1920, S. 9, was then enacted repeating the language of

Act III of 1907. In England, a 'Deed of Arrangement Act' was passed in 1887, and another in 1913 and they were consolidated by the Act of 1914 (4 and 5 Geo. V c. 47).

Now, in England, it was the established law since 1785 that a creditor who assented to a deed of arrangement could not set it up as an act of bankruptcy, *Bamford* v. *Baron* (1). In 1826, the Bankruptcy Act, 6 Geo. IV c. 16, was passed and this was followed by 1 and 2 Will. IV c. 56. It was held that there was no alteration in the law in *Marshall* v *Barkworth* (2). In 1849 the Bankruptcy Law Consolidation Act was passed. With reference to that Act, it was held in *Ex parte Alsop* (3) that, though a deed of arrangement is an act of bankruptcy so far as non-consenting creditors are concerned, the consenting creditor cannot found a petition for adjudication on it. This was followed by Lord Cairns in *Ex parte Stray* (4) (*See* Williams on *Bankruptcy Practice,* 12th Edition, p. 4 and Baldwin's *Law of Bankruptcy,* 9th Edition, pp. 101-2). On the Bankruptcy Act of 1883, we have got the cases of *In re Brindley* (5), *In re Sunderland* (6) and *In re Jones Bros* (7). The section of the Bankruptcy Act of 1883 has been adopted in India in 1907 and repeated in 1920 and these decisions apply.

We do not see how the addition of a clause in S. 4 (1) (*d*) in the English Act of 1914 the effect of which seems to extend the disability to a non-assenting creditor also " in cases where he is prohibited from so doing by the law for the time being in force relating to deeds of arrangement " (*see* S. 24 of the Deeds of Arrangement Act, 1914 according to which any creditor is prohibited from applying, after the expiration of one month from the receipt of a notice from the trustee under the deed) can affect the law in India. This extension to non-assenting creditors is not available in India and this seems to be the only effect of the addition in the English Act. The old law is not affected either in England or India as to assenting creditors [see also *Kheta Mal* v. *Chuni Lal* (8)].

This contention of the appellant is therefore disallowed.

His next contention that the District Judge erred in not considering the other grounds alleged in the petition is legally correct. But he seems to have abandoned the other grounds

1. (1788) 2 T R 594 (n).
2. (1833) 4 B & Ad 508.
3. (1859) 1 De F & J 289.
4. (1867) L R 2 Ch A 374.
5. (1906) 1 K B 377.
6. (1911) 2 K B 658.
7. (1912) 3 K B 234.
8. (1879) I L R 2 A 173 at 180.

Rukmani Ammal v. Rajagopala Iyer.

Ramesam, J.

in the Court below and on the facts as disclosed in the case there is no substance in them. The result is that the appeal fails and is dismissed with costs of respondents 2 to 6. It follows that the injunction, dated the 4th October, 1922, in C. M. P. No. 2326 of 1922 is dissolved.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Pitchakkuttiya Pillai and others *Appellants* (Petitioner-Plaintiffs)*

v.

Doraiswami Mooppanar and others *Respondents (Defendants.)*

Pitchakkuttiya Pillai v. Doraiswami Mooppanar.

Civil Procedure Code, O. 21, R. 2 and O. 32, R. 6—Payment to one of several decree-holders—Decree if satisfied—Payment certified but not recorded—Recognition of, by executing Court—Decree in favour of manager and minor members of a joint Hindu family—Payment to manager—Leave of Court not obtained—Effect of.

Payment to one of several joint decree-holders will not be a satisfaction of the decree, even in part, unless the payee is an agent of the others entitled in law to receive the whole amount on their behalf, or the distinct share of each of the joint decree-holders was determined and known. *Mahomed Silar Sahib* v. *Nabi Khan Sahib,* 31 M L J 93 relied on.

Where a decree has been passed jointly in favour of the manager of a joint Hindu family and certain minor co-parceners represented by the manager as next friend, a payment to the manager, although made and certified, cannot be recognised by the Court executing the decree unless leave of the Court had been obtained for such payment under O. 32, R. 6, Civil Procedure Code. *Ganesh Rao* v. *Tuljaram Rao,* (1913) I L R 36 M 295 applied.

Under O. 21, R. 2, Civil Procedure Code, a payment to be recognised by the Court executing the decree does not require to be both certified and recorded. It is enough if it is certified or recorded.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 56 of 1922 (A. S. No. 353 of 1920, District Court, Tanjore) preferred against the decree of the Court of the District Munsif of Tiruvadi in E. P. No. 45 of 1920 in O. S. No. 173 of 1919.

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*A A A O No. 105 of 1922. 22nd April, 1924.

S. Rangachariar, V. N. Venkatavaradachariar and *A. Srirangachariar* for appellants.

Pitchakkuttiya Pillai v. Doraiswami Moopanar.

K. Bhashyam Aiyangar and *N. Kunjithapatham* for respondents.

The Court delivered the following

JUDGMENT:—This case arises out of an execution petition. The appellants, who were the plaintiffs, obtained a money decree against the respondents in 1919. The 1st plaintiff for himself and as guardian of his minor brothers, plaintiffs 2 and 3, put in an execution petition on 1st September, 1919, to recover the money. The 1st defendant was arrested and brought to Court under a warrant. On the warrant the appellant's vakil endorsed on 4th September, 1919, " Judgment-debtor may be released. Decree fully satisfied." The executing Court however then refused to record satisfaction on the ground that two of the applicants in the execution petition were minors. Neither party took any further steps to have the satisfaction of the decree recorded. On 22nd January, 1920 the 1st plaintiff for himself and as guardian of minor plaintiffs 2 and 3 again applied for execution. The judgment-debtor pleaded that the decree had already been fully satisfied. The executing Court originally proceeded on the question of law only and held that the payment endorsed on the warrant, even if true, was not a payment in law since under O. 32, R. 6, Civil Procedure Code, the 1st plaintiff was not entitled to receive any money towards the decree on behalf of minors unless and until he had obtained leave of the Court. On appeal the appellate Court called for a finding whether the judgment-debtors had actually paid up as certified on the warrant by the plaintiffs' vakil, and, if that payment had been made to the 1st plaintiff, whether he received it as manager of the joint family or not. On this the original Court found that the payment had been made to the 1st plaintiff in his capacity as manager, and these findings were accepted by the Lower Court. The Subordinate Judge then considered whether the 1st plaintiff could receive the money without leave of the Court under O. 32, R. 6, Civil Procedure Code, and he held that, as managing member he could, and he therefore dismissed the execution petition on the ground that the decree was already fully satisfied. The plaintiffs now appeal.

Pitchakkuttiya Pillai v. Doraiswami Mooppanar.

It appears to me that the remand of the case by the lower Appellate Court for a decision whether or not the payment was actually made, was unnecessary. There is a certificate on the warrant by the plaintiffs' authorised pleader that the decree was fully satisfied. Therefore the payment was certified. It is true that the lower Court refused to record it. but O. 21, R. 2, Civil Procedure Code, does not say that in order that a payment shall be recognized by the Court executing the decree that payment shall be both certified and recorded. The words used are "certified *or* recorded." There was nothing therefore to prevent the executing Court from at once recognizing the payment and the decree as fully satisfied, unless O. 32, R. 6, barred the way, while of course the Court was not bound to recognise the payment if that rule stood in the way. What the executing Court had before it was a certificate by a pleader appearing for all the three plaintiffs that the decree was fully satisfied. The execution petition and the order would also bring to its notice that two of the execution petitioners were minors, represented by the 1st plaintiff as guardian and next friend. In such a case I think the executing Court was bound to conclude *prima facie* that the payment in full satisfaction would have been made to the 1st plaintiff for himself and on behalf of the minors, and there is nothing to rebut that presumption here. In fact, the concurrent finding of fact on the evidence after remand is to the same effect.

In such circumstances, had the 1st plaintiff not been manager of the joint family of himself and plaintiffs 2 and 3, there can be no doubt that he would have had to obtain leave of the Court before receiving the money on behalf of the minors under O. 32, R. 6, Civil Procedure Code. The short question then is, does the fact that he was manager absolve him from the necessity of conforming to this rule ?

It cannot be doubted that if the execution petition had been put in by the 1st plaintiff alone as manager he would have been entitled to receive the whole payment in his capacity as manager without leave of the Court, and plaintiffs 2 and 3 could not have challenged the payment. But where he has chosen to join the minors with him and to bring them before the Court as minors and thus bring himself also before the Court in the capacity of *guardian-ad-litem,* can it be pleaded by himself as well as by the minors that the payment to him without leave of the Court is a nullity ?

Pitchak-kuttiya Pillai v. Doraswami Mooppanar.

The plaintiffs rely chiefly on the Privy Council case in *Ganesh Rao* v. *Tuljaram Rao* (1). That was a case in which a compromise of a partition suit had been made by the father and manager of a joint family. He was the 3rd defendant in the case, and he appeared on the record also as the guardian of his minor son, the 6th defendant. He compromised the suit without the leave of the Court. This High Court held interpreting S. 462 of the Code of 1882 that it was not necessary for the father to have obtained the leave of the Court before compromising the suit. The Privy Council however reversed this laying down generally that where a manager of the joint family is himself on the record as the next friend or guardian of a minor member, his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. The lower appellate Court has held that this ruling passed under S. 462 of the Code of 1882 should not, on the authority of *Krishna Hande* v. *Padmanabha Hande* (2) be applied to old S. 461, the present O. 32, R. 6, when it is a question of money due under a decree, but I do not think that it has rightly understood that case. It does not appear that in that case there was any minor on the record, and therefore the managing member was not before the Court in the capacity of a next friend or guardian. The Privy Council ruling has been applied to the provisions of O. 32, R. 6, by a single Judge of this Court in *Krishna Aiyar* v. *Chakrapani* (3).

After full consideration I am of opinion, although with considerable reluctance, that the Privy Council case concludes the matter and that the payment, although made and certified, cannot be recognised by the Court executing the decree, since the leave of the Court was not obtained under O. 32, R. 6. I have come to this conclusion with reluctance because the 1st plaintiff at least thus secures at present a double payment of the decree amount by means of his own laches. No doubt, the judgment-debtors were careless in not seeing that the satisfaction was recorded and in not insisting on the leave of the Court being obtained, but the 1st plaintiff is the real party in default and now profits by his own default.

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1. (1913) I L R 36 M 295 25 M L J 150 (P C).
2. (1913) 25 M L J 442.
3. (1915) 29 I C 475.

Pitchakkuttiya Pillai v. Doraiswami Mooppanar.

A further point has however been argued whether the payment by the 1st defendant to the 1st plaintiff will effect a discharge of the decree debt so far as the 1st plaintiff is concerned. The District Munsif has held that it will not. The lower appellate Court in the view it took naturally did not deal separately with that point. The law on the subject is, I think, clear that the payment to one of several joint decree-holders will not be satisfaction of the decree even in part unless (1) the payee is an agent of the others entitled in law to receive the whole amount on their behalf, or (2) the distinct shares of each joint decree-holder were determined and known. Vide *Mahomed Silar Sahib* v. *Nabi Khan Sahib* (4). In *Thimma Reddi* v. *Subba Reddiar* (5) this ruling was extended to certificates of satisfaction given by one of several and joint decree-holders, unless as a matter of fact the payment certified had been made to all the joint decree-holders. Both these cases rest on the judgment of Bashyam Iyengar, J., in *Periasami* v *Krishnayyan* (6). As against this, the appellant cited *Jamna Bai* v. *Vasanta Rao* (7) a Privy Council case, in which it was held that, where a joint bond was executed by two persons, one being a minor by his guardian and the bond so far as the minor was concerned was void because no leave of the Court was obtained, the other party to the bond could not plead that voidability as rendering nugatory his obligation under the bond. The Privy Council held that in any case the major promisor under the bond was liable and could not plead the minority and consequent immunity of the other promisor as a bar to his liability. I do not think that this case really assists the decision of the present case, where the question is not of the liability of the decree-holders to the judgment-debtor but of the liability of the judgment-debtor to the joint decree-holders. In *Sultan Moideen* v. *Savalayammal* (8) it was held that where payment has been made to one of two joint decree-holders that payment was valid to the extent of the share to which the payee was entitled, and therefore an enquiry was ordered as to the extent of that share. This ruling is certainly not in conformity with the later cases quoted above. I consider that I must follow the later cases and hold that the payment is not valid against even the 1st plaintiff. The

4. (1916) 31 M L J 93. 5. (1918) M W N 507.
6. (1902) I L R 25 M 431 12 M L J 166 (F B).
7. (1916) I L R 39 M 409 : 31 M L J 18 (P C).
8. (1892) I L R 15 M 343 : 2 M L J 50.

decree had to be executed as a joint decree or not at all. Valid discharge of any portion of the debt could only be given by one who could give it for all joint decree-holders, and the 1st plaintiff could not do that because the discharge so far as the minor plaintiffs were concerned was not valid in law at all. Hence I must hold that the decree has not been at all satisfied. I therefore hold that the decision of the District Munsif was correct and this appeal must be allowed, but in the circumstances appellants are refused costs here and in the lower appellate Court.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

The Secretary of State for India in Council represented by the Collector of Salem ... *Appellant** (*Defendant*)

v.

T. V. Raghavachariar ... *Respondent* (*Plaintiff*).

Poramboke—*Jungle stream passing through survey field—Patta granted—If includes water channel—Liability of pattadar to pay water-cess—Riparian rights—Mixed question of fact and law.*

A jungle stream passed through certain survey fields which were the patta lands of the plaintiff and then emptied itself into a Government irrigation source. The stream was Government property prior to the grant of the patta, but in the patta the channel was not separately demarcated and specified as Government *poramboke.* The plaintiff dammed the stream and used the water for raising wet crops on his dry lands, and the Government levied water-cess for the same. *Held,* the grant of the patta for the fields did not automatically carry with it the grant of any Government *poramboke* already existing within the fields and the Government was justified in levying water-cess. *Kalianna Mudali* v. *The Secretary of State for India in Council,* 31 I C 982 distinguished; Madras Act III of 1905 and case-law thereunder referred to.

Per Odgers, J. :—Where a party claims to have riparian rights, it is a mixed question of fact and law which cannot be raised for the first time in Second Appeal.

Per Wallace, J. :—A patta is not a document of title or deed of grant but merely a record of demand by Government of a certain amount as land revenue on a certain area.

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*S A No. 334 of 1921. 22nd January, 1924.

The Secretary of State for India
v.
Raghavachariar.

Second Appeal against the decree, dated 22nd July, 1920, of the Court of the Subordinate Judge of Salem, in Appeal Suit No. 118 of 1920, preferred against the decree, dated 28th December, 1918, of the Court of the District Munsif of Dharmapuri in Original Suit No. 34 of 1917.

The Government Pleader for appellant.

T R. Vijiaraghavachariar for respondent.

This case was heard in the first instance by Ayling and Odgers, JJ. who delivered the following

JUDGMENT :—This Second Appeal arises out of a suit for recovery of water-cess alleged to have been illegally levied by Government. It appears that the plaintiff took the water on account of which the cess was levied from a channel, which passed through his pattah land, but was not separately demarcated as poramboke. The fact has been treated by both the Lower Courts as conclusive against Government as to the legality of the levy reliance being placed on a passage in a judgment in *Kalianna Mudali* v. *The Secretary of State for India in Council by the Collector of Salem* (1) which runs as follows :—

As to the claim to levy water-cess, these rills run through plaintiff's pattah land, and their beds have not been separately demarcated as poramboke ; they are part of the pattah land and not the property of the Government, and therefore the water course cannot be said to belong to Government as decided day before yesterday in Appeal Suit No. 113 of 1910 (on the file of the High Court)."

The learned Government Pleader in Second Appeal argues that this judgment (which is not reported in the regular series) needs re-consideration.

I was a party to it, though it is hardly necessary to say that after the lapse of nearly eight years, my memory of the case is of no assistance. I think, however, that in any attempt to apply it to other cases, strict regard must be had to the fact that we were there dealing with " rills " feeding a pond, and not artificial irrigation channels. " Rill " is defined in the Oxford Dictionary as a small stream, brook, runnel or rivulet implying a natural, and not artificial origin, and a reference to the judgment in Appeal Suit No. 113 of 1910 which is quoted,

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1. (1915) 31 I C 982.

shows that the latter dealt with the ownership of the beds of *rivers*, and the water flowing over them. In so far as natural streams are concerned, I do not at present see any reason to doubt the correctness of our decision. Artificial irrigation channels stand on a totally different footing. When these are small, they are frequently not separately demarcated as poramboke; but their character as poramboke is not affected by the omission to do so. The learned Government Pleader refers us to the following passage in the Settlement Register of the suit village (Exhibit IV) "It must be distinctly borne in mind that at the Original Settlement, a deduction of 25 per cent. has been made from the gross produce on account of unfavourable seasons and on account of any roads, channels, banks, paths, etc., that may have been measured in with the cultivated area. The fact of the inclusion, therefore, of any Government poramboke in any re-survey field does not confer on the cultivator of that field the right of entering on such poramboke or of in any way interfering with it and any unauthorized encroachment on such poramboke will be severely dealt with."

The Secretary of State for India v. Raghavachariar.

Ayling, J.

It will be apparent from this that the fact that the channel forms part of a survey number held in patta without separate demarcation does not, by itself, show that the said channel is not a poramboke channel.

The ruling in *Kalianna Mudali* v. *The Secretary of State for India in Council by the Collector of Salem* (1) does not therefore conclude the case, and I would call upon the Subordinate Judge to submit findings on the issues on the evidence on record in the light of the above remarks. Findings should be submitted by July 16th; seven days will be allowed for objections.

Odgers, J.—I agree. Odgers, J.

The Court delivered the following

JUDGMENTS :—*Odgers, J.*—This suit was brought by the plaintiff against the Secretary of State in Council to recover the amount of water-cess charged on the plaintiff because the plaintiff took Government water to irrigate his dry lands. The District Munsif found that the water-course could not be said to belong to Government and this was upheld by the Subordinate

Odgers, J.

1. (1915) 31 I C 982

The Secretary of State for India v. Raghavachariar.

Odgers, J.

Judge, both the Lower Courts relying on the decision in *Kalianna Mudali* v. *The Secretary of State for India in Council by the Collector of Salem* (1) to which further reference will be made. The appeal was heard originally before Ayling, J. and myself and the case was remitted to the Lower Appellate Court for fresh findings on all the issues. It was then submitted by the learned Government Pleader that the decision in *Kalianna Mudali* v. *The Secretary of State for India in Council by the Collector of Salem* (1) required reconsideration and we pointed out in our judgment that the case relied on was concerned with rills feeding a pond. We pointed out, however, that small natural streams are frequently not separately demarcated as poramboke but their character as poramboke is not affected by the omission to do so and we also pointed out that it was apparent from the passage in the settlement register of the suit village, Exhibit IV, that the fact that the channel forms part of a survey number held in patta without separate demarcation does not by itself show that the said channel is not a poramboke channel. We held that the ruling in *Kalianna Mudali* v. *The Secretary of State for India in Council by the Collector of Salem* (1) did not conclude the case and, as stated, called upon the Lower Appellate Court to return further findings on all the issues. This the Lower Appellate Court has now done, and the finding still is that the plaintiff did not take water to his survey numbers from any Government source. The learned Subordinate Judge, relying on the fact that it was not an artificial irrigation channel and that therefore in his opinion the decision in *Kalianna Mudali* v. *The Secretary of State for India in Council by the Collector of Salem* (1) supported the plaintiff, was apparently of opinion that if the lands on either side of the channel were the patta lands of the plaintiff, it must be held that the channel and its water were included in the patta. This in fact is a point relied on for the plaintiff before us. It was urged as a preliminary point that this question is purely one of fact and cannot be raised in second appeal. But in my opinion, the grounds of the reasoning of the learned Subordinate Judge must be examined to see if they are supportable in law and if they are not, it follows that his inference of fact from them can also not be supported. The plaintiff began by

1. (1915) 31 I C 982.

The Secretary of State for India v. Raghavachari. — Odgers J.

denying that there was any *odai* (stream) running through his land at all. This has been found to be absolutely false and I have no hesitation in concurring. As a matter of fact, the stream or channel runs through survey numbers 13 and 17, the plaintiff's patta lands, to the south and falls into a tank in the Railway poramboke, which there is reason to think is a Government irrigation source. The passage in the settlement Register has been already referred to and it occurs also in the preamble to the patta. It is perfectly clear that a patta is merely a bill for rent and is in no sense a grant or conveyance of the land referred to therein. See *The Secretary of State for India in Council* v. *Kasturi Reddi* (2) and *Muthu Veera Vandayan* v. *The Secretary of State for India in Council* (3). It is also clear that the land and it was admittedly the water channels were poramboke before the grant of patta. The provisions of the Madras Act III of 1905, S. 2 which have been discussed in a variety of cases in this Court lay down that "all rivers, streams, etc., and water-courses are and are hereby declared to be the property of Government except as may be otherwise provided by any law for the time being in force subject to the natural and easement rights of other landowners and to all customary rights legally subsisting with regard thereto." If the pattadar has not prescribed against Government for the use of the water in this channel or for the ownership of the bed thereon, it is clear that he has no grant of such rights contained in his patta. Such streams as the one under consideration have in my opinion been expressly excepted from the grant. It has been said by the Privy Council in *Prasad Row* v. *The Secretary of State for India* (4) that with regard to the true meaning and construction of the Act, various difficulties arise and those difficulties are evident from the conflict of opinion that has arisen in this High Court with regard to it. For instance, in the judgment of Abdur Rahim, J. in *Chinnappan Chetty* v. *The Secretary of State for India in Council* (5) he points out "that the rights of the Government in water are in connection with its position as a landowner may be deduced

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(1902) I L R 26 M 268 : 12 M L J 453

3. (1906) I L R 29 M 461.

4. (1917) I L R 40 M 886 33 M L J 144 (P C).

5. (1917) I L R 42 M 239 at 259 36 M L J 124 (F B).

The Secretary of State for India v. Raghavachariar.

Odgers, J.

from the use of the words 'other landowners' in the saving clause" so it appears to me that, if the ownership of the banks of the stream is still vested in Government, it cannot be said that the pattadar has any rights of ownership in the water thereon. This is pointed out by Sadasiva Aiyar, J. in *The Secretary of State for India* v. *Janakiramayya* (6) wherein he says "Ryotwari lands stand on an entirely different footing from Zamindari and Inam lands as Government has not lost proprietary rights over ryotwari lands. That ryotwari land continues to be Government land Thus the Government treats itself as owner of its ryotwari tenants' lands while it treats the Zamindar and Inamdar as owner of the lands in permanently settled estates." In *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* (7) Miller and Munro, JJ. held that under S. 2 of Act III of 1905, where the channel or river, which is the flowing body of water, is not shown to belong to a private person, it belongs to Government although private persons may be proprietors of the bed. The riparian proprietors have easement rights, but they are not on that account owners of the channel, and they cannot use water which belongs to Government free from cess in the absence of an engagement with Government to that effect. They laid down that S. 2 declared that subject to the natural rights of other landowners, all standing and flowing waters which are not the property of anybody else are the property of Government. This case came on appeal to the Privy Council in *Prasad Row* v. *The Secretary of State for India* (4) where their Lordships recognize the difference in the law of this Presidency as to the rivers and streams from the English law and say that "it is quite possible that it recognizes some proprietary rights on the part of Government in the water flowing in rivers and streams." Again, in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (8) Abdur Rahim, J. held that "in order to justify the imposition of cess under this Act, it must be made out that the irrigation is caused by water supplied or obtained from a stream or river belonging to the Government," and he did not understand the provisions of Act III of 1905 as laying down that "even in

4. (1917) I L R 40 M 886 . 33 M L J 144 (P C).
6. (1915) 29 M L J 389 at 421 (F B)
7. (1909) I L R 34 M 295 : 20 M L J 823. 8. (1917) 33 M L J 415.

those streams and rivers in which the riparian rights of Zamindars or other owners of adjacent lands exist, a separate and independent proprietary right in the water subsists in the Government entitling it to demand from the owners of the lands on the banks any price it chooses for the use of the water." This was concurred in by Srinivasa Aiyangar, J., but on the ground that the plaintiff had been drawing off the same quantity of water from time immemorial but he refused to consider the effect of Act III of 1905. I am therefore of opinion that the patta of the plaintiff does not include this undemarcated poramboke stream.

The second contention is that, if Government intended it not to be included in the patta, they ought to have excepted the channel from the patta. Reference has been made to the Survey Manual and to the Board's Standing Orders ; but it seems to me that this cannot in any way have the force of law being merely directions of the authorities to their officers, either survey or revenue, as to the way in which their duties should be carried out.

The third question raised is that no presumption in favour of Government arises from the provisions of Act III of 1905. This I have already dealt with in considering the first question. But I may add this, in *The Secretary of State for India* v. *Janakiramayya* (6) it was held by a majority of the Full Bench as against the observations in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (8) that a special presumption is raised in favour of Government by Madras Act III of 1905. (*See* per Oldfield, J. at page 398 and per Bakewell, J. at page 403).

The fourth contention of the plaintiff is that he has riparian rights. This is a question of at least mixed law and fact which he has not raised in either of the lower Courts and which in my opinion he is debarred from raising in Second Appeal. That is sufficient to dispose of this point. But I may add that whatever riparian rights, if any, the plaintiff might have in the water of this stream, it is more than doubtful if he was at liberty to erect two dams or diversions by which a considerable portion at least of the waters of the stream was diverted in order to

6. (1915) 29 M L J 389. 8. (1917) 33 M L J 415.

The Secretary of State for India v. Raghavachariar.

Odgers, J.

irrigate his own dry patta lands. That would raise a question as to whether the rights of lower riparian owners, if any, have been infringed and whether the flow through this *odai* to the tank or Manalpallam has been interfered with. This is, of course, a question of evidence which cannot be allowed to be raised here. Reference may be made to S. A. No. 1639 of 1918 to which I was a party in which it was said that the District Munsif thought that ryotwari landholders were entitled to all the rights of riparian owners under the English Law. They may be said to own some such rights, such as the rights of access to the river for using the water, for bathing and for domestic purposes and so on; but so far as irrigation rights are concerned, it has been pointed out in *Lakshmiah* v. *Narayanappa* (9) that the only direct rights which the ryotwari landholders have are either derived (through express or implied contract) from the Government or are acquired against Government by prescription.

To refer to the case in *Kalianna Mudali* v. *The Secretary of State for India in Council by the Collector of Salem* (1), the judgment is extremely short. The land in question seems to have been patta land. The first part of the judgment deals with the plaintiff having acquired an easement as against Government to interrupt the flow. The second part of it deals with the claim to levy water-cess and sets out that the " rills run through the plaintiff's patta lands and their beds have not been separately demarcated as poramboke. They are part of the patta land and not the property of Government, and therefore the water-course cannot be said to belong to Government as decided day before yesterday in A. S. No. 113 of 1910." I have perused the judgment in this appeal, which was a case of Zamindari lands where under S. 2 of Act III of 1905, the Zamindar is clearly " another landowner " within the meaning of the section. It is further difficult to discover from the very short statement in *Kalianna Mudali* v *The Secretary of State for India in Council by the Collector of Salem* (1) what were the exact facts of the case. It may be that the rills began and ended on the plaintiff's own patta land without flowing into or through any other land which is not the case in appeal before us. I cannot see that this case is any real authority for the position advanced by the appellant

1. (1915) 31 I C 982. 9. (1918) 23 M L T 337.

The Secretary of State for India v. Raghavacharar.

The learned Judges relied on a case they had already decided as to Zamindari lands which as pointed out stood on a wholly different footing. For these reasons, I am of opinion that the appeal must be allowed with costs throughout.

Wallace, J.

Wallace, J. :—Plaintiff sued to recover with costs a sum paid by him as penal water-rate levied by the Tahsildar of Uttankarai Taluk, Salem District, for unauthorisedly taking Government water to his registered dry lands. It appears from the evidence in the case that plaintiff is the pattadar of Survey Nos. 13, 14 and 17 registered dry land through which a jungle stream flows which originally according to the survey plan of 1897 ended in Survey No. 17, but so far as appears from the evidence has since the grant on darkhast of Survey Nos. 13, 14 and 17 been discharging its waters into the Government irrigation source called Manalpallam, that plaintiff by mud dams at points A and B in the stream diverted a portion of the water of that stream to his dry fields and raised wet crop, and that for his interference with the water of the stream penal water-rate was imposed on him.

Both the lower Courts have decided that the jungle stream within the limits of Survey Nos. 13, 14 and 17 is the property of plaintiff and that the imposition of any water-rate for the diversion and use by him of its waters, at any point within these survey numbers is illegal. Both Courts have based their decision on the ground that the patta for these fields granted apparently to plaintiff's vendor carried with it a grant of stream bed and the water on it where it flowed through these survey numbers. In so holding, it is perfectly clear that in the present state of the law, both Courts made a fundamental mistake in law as to the legal effect of a patta, and this mistake, we are, in Second Appeal, bound to consider and rectify.

I should have thought that it was well-known law that a patta is not a document of title, or a deed of grant [see *The Secretary of State for India in Council* v. *Kasturi Reddi* (2) and *Muthu Veera Vandayan* v. *The Secretary of State for India in Council* (3)]. It is a record of demand by Government that such and such an amount is due as land revenue on such and such an area. Plaintiff admitted before us, when pressed, that the stream in question within Survey Nos. 13,

2. (1902) I L R 26 M 268. 3. (1906) I L R 29 M 461.

14 and 17 was Government property prior to the grant of patta to his vendor. It follows that neither his vendor nor himself has succeeded to the ownership of that portion of the stream unless the grant of patta or the grant of these survey numbers on darkhast somehow carried with it also the transfer of ownership of that portion of the stream. As noted, the patta implies no such grant, and plaintiff has not chosen to produce or call for the darkhast records. I wholly fail then to find any proof that the ownership of Government admitted prior to the darkhast has been lost by Government.

The mere entry of a particular area in a patta cannot be any evidence that the whole extent of the area, without any reservations, was granted on darkhast to a darkhastdar, in the face of the customary provis in all village A registers, *viz.*, that at the original settlement a deduction of 25 per cent. has been made from the gross produce on account of unfavourable seasons, and on account of any roads, channels, tanks, paths, etc., that may have been measured in with the cultivated area. The fact of the inclusion, therefore, of any Government poramboke in any re-survey field does not confer on the cultivator of that field the right of entering on such poramboke or of in any way interfering with it (Exhibit IV). The mere grant of a patta for a field does not then automatically carry with it the grant of any Government poramboke already existing within that field.

Plaintiff's claim, which amounts to saying that there cannot be any Government channels in existence within lands granted on patta, unless these channels have been separately demarcated, is directly opposed to this general provision of the settlement. It is for plaintiff to prove that this usual reservation did not form part of the contract between his vendor and Government at the time of the grant of patta. He has not even produced his patta or examined his vendor to prove this, or to prove that his vendor was ever in possession of, or owner of a portion of the stream. It seems to me almost absurd to contend that in granting a darkhast for dry lands—lands *ex-hypothesi* not entitled to Government water—Government deliberately intended to confer on the darkhastdar not merely the user of water flowing through a channel in that land to a Government source of irrigation but also the ownership of part of that channel, so that every grant of patta would

confer ownership of every channel within the land granted, and the right to dam up and stop the flow of water altogether. It is certain that Government in granting pattas never had any such intention or contemplated that such a transfer of ownership as would involve the wholesale breach of its covenant with the lower wet landholders was included in the contract. The practical inconveniences of upholding such a contention are obvious, as plaintiff himself would be the first to discover, if a pattadar further up the stream, say pattadar of field No. 1, claimed the rights which plaintiff now claims, and diverted all the water to his field so that none at all came as far as plaintiff's lands. Plaintiff's claim based on the patta appears to me therefore wholly untenable and the lower Court's acceptance of it is based on a material misconception of the law. The case cited by plaintiff, *Kalianna Mudali* v. *The Secretary of State for India in Council by the Collector of Salem* (1), besides being a case not published in the authorised reports, does not seem to me of any assistance to plaintiff, since from the facts of that case, it appears that the "rills" feeding the pond were wholly in the plaintiff's lands and had presumably never belonged, at any time, to Government.

Plaintiff has attempted before us to support the decree appealed against, on two grounds not taken before, (*a*) that under the B. S. O., Government does not charge water-rate for water taken from jungle streams provided no irrigation lower down is interfered with, (*b*) that plaintiff as owner of both banks of the stream in Survey Nos. 13, 14 and 17 possesses the natural rights of a riparian owner to usufruct of the water as it flows between his banks. As to (*a*) the foundation for such a case has not been laid, and Government was never called upon to meet such a case, while it appears in evidence (defendant's 4th witness) that the jungle stream *does* feed an irrigation source so that the B. S. O. quoted has no application. As to (*b*) again such a claim was never agitated in the lower Courts. Had it been, it would have been open to Government to contend—

(1) that a mere darkhast ryotwari pattadar of dry lands has no riparian rights to water for irrigation purposes (*see* S. A. No. 1639 of 1918);

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1. (1915) 31 I C 982.

The Secretary of State for India v Raghava chariar. — Wallace, J.

(2) that even if he has, such rights do not permit the diversion by mud dams of water which would otherwise flow into a Government irrigated source. I am of opinion that such mixed questions of fact and law cannot be agitated for the first time here in Second Appeal.

It is clear then that as between plaintiff and Government the ownership of this channel and the water in it within fields Nos. 13, 14 and 17 belongs to Government and that the charge of water-rate ordinary or penal for water taken therefrom to dry lands is in accordance with law (Acts VII of 1865 and III of 1905). This Second Appeal must therefore be allowed and plaintiff's suit dismissed with costs here and below.

T. S. V. *Second Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Arunachala Goundan *Petitioner**

v.

Katha Goundan and others *Respondents.*

Arunachala Goundan v. Katha Goundan.

Civil Procedure Code, O. 5, R. 1 and O. 9, Rr. 9 and 13—Appearance by pleader—Pleader reporting no instructions—Dismissal for default—Restoration.

On the day on which a suit was posted for hearing, the plaintiff's pleader appeared and stated he had no instructions. Thereupon the Court dismissed the suit. *Held,* that the dismissal of the suit under the above circumstances, was a dismissal for default and that an order restoring the suit by the Court below was rightly passed. When a pleader appears and says he has no instructions, he intends to inform the Court that he had no instructions to conduct the case either wholly or partially ; in other words, he tells the Court that, though he has filed an appearance, he does not propose to appear for his client. It is a contradiction in terms to hold that a person who says he does not appear does, in fact, appear. *Gopalh Row* v. *Maria Susaya Pillai,* I L R 30 M 274 followed.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the Orders of the District Court of Coimbatore in C. M. A. Nos. 65 and 67 of 1922 preferred against the Orders in C. M. P. Nos. 321 and 320 of 1922 in O. S. Nos. 333 and 286 of 1921 on the file of the Court of the Additional District Munsif of Coimbatore.

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*C R P Nos. 212 and 213 of 1923. 11th March, 1924.

Watrap S. Subramania Aiyar and *A. S. Srinivasa Aiyar* for petitioner.

T. Rámachandra Aiyar for respondents.

The Court delivered the following

JUDGMENT :—There were two suits before the District Munsif, the one he dismissed for default on account of the non-appearance of the plaintiff, and in the other he passed an *ex parte* decree on account of the defendant not having appeared. The plaintiff in the first suit and the defendant in the second suit happen to be the same person. Applications were made to the District Munsif to set aside the order of dismissal for default in the first suit and to set aside the *ex parte* decree in the second suit. The District Munsif refused to allow these applications, but on appeal the District Judge made orders favourable to the applicant. The propriety of these orders is challenged in the revision petitions before me.

A Vákil appeared for the party in default and stated he had no instructions. It is argued that notwithstanding this the pleader must be held to have appeared on his client's behalf and, therefore, the provisions of O. 9 do not apply. I am utterly unable to follow this argument. O. 3, R. 1, so far as it is material for the present purpose, runs thus :— " Any appearance in any Court required by law to be made by a party may be made by a pleader duly appointed to act on his behalf." O. 5, R. 1, sub-clause (2) provides:—"A defendant to whom a summons has been issued under sub-rule (1) may appear (*a*) in person, or (*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or (*c*) by a pleader accompanied by some person able to answer all such questions." This provision no doubt refers in terms to a defendant, but in principle there seems to be no distinction for this purpose between a defendant and a plaintiff, and I am quite clear that the same rule is to be applied in regard to both. When a pleader appears and says he has no instructions, I take it that he intends to inform the Court that he has no instructions to conduct the case either wholly or partially ; in other words, he tells the Court that, though he has filed an appearance, he does not propose to appear for his client. It seems to me to be a contradiction in terms to hold that a person who says he does not appear

Arunachala Goundan v. Katha Goundan.

does, in fact, appear. It has been argued that it is necessary for a pleader to say in such circumstances that he severs his connection with the case, or that he withdraws his vakalat. I do not think any set form of words is necessary to convey to the Court the information that he has ceased to appear and that he, in fact, does not appear for his client. There is no magic in the words "I have ceased my connection with the case." In my opinion the mere attendance of a pleader who, for want of instructions, is unable "to answer all material questions relating to the suit" is not an appearance on behalf of his client. Another case may arise where the pleader appears and says that he applies for an adjournment and on the adjournment being refused informs the Court that he has no instructions. Here again, I am perfectly clear that there is no appearance on behalf of the party. Then a third contingency may arise. The pleader may be duly instructed and be able to answer all material questions, but still he may tell the Court, "I have no instructions". This conduct may render him liable at the instance of his client, but the question that is material for the present purpose is, was there or was there not an appearance? Supposing that a pleader who has been retained is actually engaged in another Court and fails to appear, can it be said that there is an appearance on behalf of his client? *Failure to appear* and *refusal to appear*, do, I think, stand on the same footing. In neither case can there be said to be an appearance. The matter seems to be simple in the extreme and but for the large body of conflicting decisions on the point, I should have had no difficulty in deciding the case. There is abundant authority in favour of the proposition, as I have stated it. *Gopala Row* v. *Maria Susaya Pillai* (1), *Soondarlal* v. *Goorprasad* (2) and *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (3) and I am not prepared to follow the decisions which take a different view.

The Civil Revision Petitions, therefore, fail and are dismissed; No. 212 with costs. In No. 213 the petitioner will pay the counter-petitioner only the printing charges; no Vakils' fee is allowed.

A. V. V. *Petitions dismissed.*

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1. (1906) I L R 30 M 274 17 M L J 225.
2. (1898) I L R 23 B 414.
3. (1907) I L R 34 C 403 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Areti Singarayya *Appellant** (*2nd defendant*)

v.

Areti Subbayya and others *Respondents* (*Plaintiff and defendants* 4, 5 *and* 1).

Areti Singarayya *v.* Areti Subbayya.

Contract—Enforceability—Sale of land—Agreement by vendee to discharge debt of vendor—Right of suit—Privity of contract—Rule as to—Exception—All parties before Court—Effect.

The vendee of a property undertook to discharge a debt due by his vendor to a third party. The plaintiff alleging that the third party was a *benamidar* for him sued for the amount due impleading as defendants the *benamidar*, the vendee and the vendor. It was proved that the third party was a *benamidar* for the plaintiff, but the vendee pleaded that he was not liable as there was no privity between him and the plaintiff. *Held,* the ordinary rule of law that a stranger to a contract though a beneficiary thereunder could not sue upon it does not prevent a Court, in the exercise of its equitable jurisdiction, from passing a decree in his favour, when all the parties affected by the contract are before the Court.

Gregory v. *Williams,* (1817) 3 Mer. 582 ; *Dwarakanath Ash* v. *Priya Nath Malvi,* 36 I C 792 ; *Debnarayana Dutt* v. *Chunilal Ghose,* I. L. R. 41 Cal. 137 and *Peria Thiruvadi Aiyangar* v. *Pokutti Janaki,* 45 M. L. J. 693 followed ; *Tweddle* v. *Atkinson* (1861) 1 B and S. 393 ; *Panku Menon* v. *Dharman Achan,* I L R 41 Mad. 488 ; *Iswaram Pillai* v. *Sonnevaveru Taragon,* I L R 38 Mad. 753 referred to.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Ellore in A. S. No. 5 of 1921 (A. S. No. 185 of 1920 on the file of the Court of the Subordinate Judge of Ellore), preferred against the decree of the Court of the Additional District Munsif of Tanuku in O. S. No. 388 of 1918 (O. S. No. 964 of 1917 on the file of the Court of the Principal District Munsif of Tanuku).

K. Ramamurthi for appellant.

K. Kameswara Rao for respondents.

The Court delivered the following

JUDGMENT :—The main question argued in this second appeal is whether the plaintiff could maintain the suit against the 2nd defendant. The 2nd defendant is the vendee of certain property from defendants 3 to 5. Under the deed, Ex. A, he undertook to discharge a debt of Rs. 888 due by defendants 3 to 5 to the 1st defendant. The plaintiff brings

*S A No. 1339 of 1921. 10th July, 1924.

Areti Singarayya v. Areti Subbayya.

the suit against the defendants alleging that the 1st defendant is a *benamidar* for him and that he is entitled to the amount mentioned in Ex. A. The learned District Munsif found that the 1st defendant was a *benamidar* for the plaintiff and gave a decree against defendants 3 to 5 and exonerated the 2nd defendant on the ground that there was no privity of contract between the plaintiff and the 2nd defendant. On appeal the learned Subordinate Judge held that inasmuch as all the parties to the transaction were before the Court, the Court was entitled to pass a decree against the 2nd defendant as well, and he modified the decree of the Court of first instance by passing a decree against the 2nd defendant as well. It is contended before me that the decision of the Subordinate Judge is wrong as the 2nd defendant did not undertake to pay the plaintiff the amount mentioned in the sale deed ; and reliance is placed upon *Isti Panku Menon* v. *Dharman Achan* (1). In that case a Full Bench of this Court held that the principle of the decision in *Tweddle* v. *Atkinson* (2) applied to India and a stranger to the contract could not sue on the contract even though under the contract some benefit was reserved for him. In this case, the vendee and the person to whom the vendee undertook to pay the amount are before the Court. Whether in a case like this the plaintiff should fail because the undertaking was not to him is a question which is not free from difficulty. In *Dwarakanath Ash* v. *Priya Nath Malvi* (3), a Bench of the Calcutta High Court held relying upon the well-known case of *Gregory* v. *Williams* (4) that where all the parties were before the Court it was open to the Court to give relief to the plaintiff even though no promise was made to him by the person liable. In the case of *Gregory* v. *Williams* (4), the engagement was with one Parker, and it was he that paid the consideration, but Gregory did not furnish any consideration and he was no party to the contract. Parker acted as his trustee; and Gregory derived an equitable right through the mediation of Parker's engagement. Sir William Grant, M. R., held that inasmuch as Parker and Gregory were plaintiffs the plaintiffs could succeed. In *Debnarayana Dutt* v. *Chunilal Ghose* (5) Sir Lawrence Jenkins examined the case of *Tweddle* v. *Atkinson* (2) and stated: " The bar then in the way of an action by

1. (1917) I L R 41 M 488.
(1861) 1 B & S 393.
3. (1915) 36 I C 792.
4. (1817) 3 Mer 582.
5. (1913) I L R 41 C 137.

Areti Singarayya v. Areti Subbayya.

the person not a direct party to the contract was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience." This case has been examined by a Bench of this Court in *Iswaram Pillai* v. *Sonnivaveru Taragon* (6). Some observations in that judgment are, no doubt, against the view taken by Sir Lawrence Jenkins in the Calcutta Case. There are exceptions to the principle enunciated in *Tweddle* v. *Atkinson* (2) as in the case of family settlements, partition arrangements, etc. Persons who are not actual parties to the agreement or engagement are entitled to sue for the benefit reserved to them under such arrangements or engagements. But apart from that where a Court has before it all persons and is in a position to do complete justice to the case, it would be straining the law to hold that the suit should fail on the ground that the defendant did not contract with the plaintiff to pay the amount which he contracted to pay on his behalf. In a recent case decided by this Court which is reported in *Peria Thiruvadi Iyengar* v. *Pokutti Janaki* (7), Venkatasubba Rao, J., observes at page 697: "The 2nd and 3rd defendants have undertaken to pay the plaintiff Rs. 1,500. The undertaking is absolute. They have not said that they will be liable to pay Rs. 500 only in the event of the security being sufficient to pay off both the mortgages. The competition is only as between the plaintiff on the one hand and the 2nd and 3rd defendants on the other There is no third party involved. The contest is merely between the plaintiff on the one hand and the defendants 2 and 3 on the other." And he held that the plaintiff was entitled to succeed. It is unnecessary to refer to a number of cases on the point, such as *Jamnadas* v. *Ram Autar Pande* (8), and *Khwaja Muhammad Khan* v. *Hussaini Begam* (9). So long as the principle of the decision in *Gregory* v. *Williams* (4) is held to be good law there is no reason why the plaintiff in this suit should not succeed. The case of *Gregory* v. *Williams* (4) is cited with approval in *In re, Empress Engineering Company* (10). Lord Justice James clearly says that any objection on the score of misjoinder would not have been tolerated

2. (1861) 1 B & S 393.
4. (1817) 3 Mer 582.
6. (1913) I L R 38 M 753.
7. (1923) 45 M L J 693.
8. (1911) I L R 34 A 63.
9. (1910) I L R 32 A 410.
10. 16 Ch D 125 at 130.

Areti Singarayya v Areti Subbayya.

in that case. That being so, I think the judgment of the learned Subordinate Judge is right, and the plaintiff is entitled to a decree against the 2nd defendant as well.

The other point raised in the case is as to interest claimed by the plaintiff. By Ex. A the 2nd defendant did not undertake to pay any interest. It is a sum certain and the plaintiff is entitled to claim interest only from the date of demand. There is no evidence that he made any demand prior to the date of plaint. The Subordinate Judge is not right in awarding interest from the date of breach of contract. The plaintiff is entitled to interest at 6 per cent. per annum from the date of plaint as given by the District Munsif. The decree will be modified to this extent. With this modification the second appeal is dismissed with proportionate costs of the 1st respondent.

T. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Nallur Chakravarthi Rajagopalachariar *Appellant** (*Pltff*)

v.

Bashyachariar and others *Respondents* (*Defendants Nos.* 1 *to* 4, 6, 8 *to* 10, 5, 11 *and* 7).

Rajagopalachariar v. Bashyachariar.

Civil Procedure Code, O. 8, *Rr.* 4 *and* 5—*Pleadings—Allegations in—Denial to be specific—Scope of the rule.*

In a suit instituted on 7th September, 1918, by the reversioners of a deceased Hindu to recover possession of properties alleged to have been in the possession of his widow as his heiress, it was alleged in the plaint that the widow died on 28th September, 1906. The defendants in their written statement pleaded that they did not admit that the widow died on the date specified in the plaint and further stated that the plaintiff's suit was barred by limitation. Issues were framed as to the date of the death of the widow and limitation. *Held,* that there was no admission but a denial by the defendants of the date of the widow's death as alleged in the plaint and that the plaintiff had to prove that he had brought the suit within twelve years of the death of the widow.

Second Appeal against the decree of the District Court of South Arcot in A. S. Nos. 18 and 35 of 1920 preferred against

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*S A No. 1370 of 1921. 27th March, 1924.

Rajagopalachariar v. Bashyachariar.

the decree of the Court of the District Munsif of Tirukoilur in O. S. No. 907 of 1918.

T. R. Ramachandra Aiyar and *S. Ramaswami Aiyar* for appellant.

S. Varadachariar, T D. Srinivasachariar, K. S. Krishnaswami Aiyangar and *V Krishnamachariar* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff brings this suit as a reversioner to recover properties which were in the possession of the widow of the last male holder. He brought the suit on the 7th of September and alleged in his plaint that the widow had died on the 28th of September 1906 thus bringing his suit within time. The defendants in their written statement pleaded as follows "The plaintiff should prove that the said Seshammal died on 28th September, 1906 and these defendants do not admit that date as the date of her death." Later on in the written statement they say: "The plaintiff's suit is barred by limitation also." The 5th defendant in a separate written statement also took the plea that the suit was barred by limitation. Issues were accordingly framed, the 6th issue being "Whether the suit is barred by limitation?" and subsequently an additional issue was framed "When did the widow Seshammal die?" The District Judge has found that Seshammal did not die on the date alleged by the plaintiff and that consequently the suit was barred by limitation and now in Second Appeal it is urged that this finding, although a finding of fact, cannot be accepted because there was an admission in the defendants' pleadings of the allegations by the plaintiff. The provision of the Civil Procedure Code relating to this is O. 8, R. 5, which states that "Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability." In the present case the defendants distinctly stated that they did not admit the plaintiff's allegation as to the date of Seshammal's death. It is argued that inasmuch as they did not make a counter-allegation as to what that date exactly was, it must be deemed to be an admission within the meaning of R. 5 and reliance is placed on several English cases, *i. e., Thorp* v. *Holdsworth* (1),

1. (1868) 3 Ch. D. 837.

Rajagopalachariar v Bashyacharıar.

Tildesley v. *Harper* (2) and *Rutter* v. *Tregent* (3). These cases, however, appear to me to be based not on the corresponding provision to R. 5 but to the provision corresponding to R. 4 of O. 8 which says that "Where a defendant denies an allegation of fact in the plaint he must not do so evasively." In these cases there were several circumstances set out in the plaint as constituting the details of certain transactions and instead of denying those several circumstances specifically, the defendants denied them as a whole and as pointed out in one of the judgments such denial would be perfectly justified, provided any one of these circumstances was not strictly accurate, but that it did not amount to a denial of each and every one of those allegations. In the present case there is no question of evasive denial for here there is only one fact alleged and that has been stated to be not admitted. Whether the defendants actually knew the date of Seshammal's death or not at the time they made this pleading does not seem to be material. It was understood by all the parties that this plea of limitation was taken and that the ground of the plea was that the suit was not brought within twelve years of Seshammal's death. There is no question of the plaintiff being taken by surprise and consequently, there being no admission as to the date, the finding of the District Judge must be accepted. In that view, this Second Appeal fails and is dismissed with costs, two sets.

A. V. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Mu. Chidambaram Chettiar *Petitioner** (*Petitioner*)

v.

C. K. Kadar Mohideen Rowther and others *Respondents* (*Respondents*).

Chidambaram Chettiar v. Kadar Mohideen Rowther.

Civil Procedure Code, O. 33, *R.* 3—*Pauper application— Presentation to Sherishtadar—If valid—Madras Civil Rules of Practice, R.* 14—*If* ultra vires.

In O. 33, R. 3, Civil Procedure Code, the insistence is on the words "in person" and not on "to the Court" as meaning the Judge himself. There is no reason to hold that R. 14 of the Civil Rules of Practice is *ultra vires* and the mere fact that an applicant *in forma pauperis* presented his application to the Sherishtadar is no ground for rejecting the same.

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2. (1871) 7 Ch. 403. 3. (1879) 12 Ch. 758.

*C R P No. 762 of 1922. 23rd July, 1924.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Tinnevelly, dated 1st March, 1922, in O. P. General No. 1084 of 1922 (No. 17 Register).

Chidambaram Chettiar v. Kadar Mohideen Rowther.

P. V Krishnaswami Aiyar for petitioner.

R. Ganapathi Aiyar for 1st and 5th respondents.

The Court made the following

ORDER :—The petitioner's pauper petition was rejected merely because it was presented in person to the Sheristadar and not to the Court.

There is no reason to hold that R. 14 of the Civil Rules of Practice is *ultra vires*. "Court" is nowhere defined in the Code of Civil Procedure (1908) and the "Court or such officer as it appoints in this behalf" is the Court for purposes of receiving suits, and, by analogy, applications. The insistence in O. 33, R. 3, Civil Procedure Code, is on "in person" not on Court as meaning "Judge himself." If necessary the learned Subordinate Judge may take up the petition again in the light of these remarks but possibly subsequent circumstances have rendered further action unnecessary.

T. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS..

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Doorvas S. S. Subbarama Aiyar *Appellant** (*Petitioner-Plaintiff.*)

v.

Somalinga Subba Aiyar and another *Respondents* (*Defts.*)

Subbarama Aiyar v. Subba Aiyar.

Civil Procedure Code, O. 38, R. 5—Attachment before judgment—Security—Suit dismissed by trial Court but decreed on appeal—Liability of surety.

Where a person furnishes security under O. 38, R. 5, Civil Procedure Code with a view to avoid an attachment before judgment, his liability as surety ceases with the dismissal of the suit by the trial Court and does not revive if the suit is decreed on appeal.

Sheik Suleman v. *Shivram Bhikaji*, (1887) I. L. R. 12 B. 71 ; *Gallamudi Venkatasubba Row* v. *Chaparala Rosayya*, (1914) M W N 714 referred to.

Errikulappa Chetti v. *The Official Assignee of Madras*, (1915) I L R 39 M 903 followed. *Janaki Nagasami Aiyar* v. *Ramaswami Aiyangar*, (1919) 11 L W 6 not followed.

Ramiah Aiyar v. *Gopalier*, (1918) I L R 41 M 1053 ; *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*, (1919) I L R 42 A 158 distinguished.

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*A A O No. 324 of 1923. 4th April, 1924.

Subbarama Aiyar v. Subba Aiyar.

Appeal against the Order, dated 13th August, 1923 of the Court of the Subordinate Judge of Madura in Execution Petition No. 92 of 1923 in O. S. No. 19 of 1918.

K. Bhashyam Aiyangar for appellant.

T. Narasimha Aiyangar and *P. R. Srinivasan* for respondents.

The Judgment of the Court was delivered by

Krishnan, J.

KRISHNAN, J. :—In this case the appellant brought a suit against the first respondent in the Sub-Court of Madura and pending that suit, applied for attachment before judgment under O. 38, R. 5, of the Civil Procedure Code. The 1st respondent agreed to furnish security and executed the bond, the effect of which is the question now before us. His suit was subsequently dismissed by the first Court. The appellant however succeeded in getting a decree in the Appellate Court. He now applies to have his decree executed against the properties mentioned in the security bond. It should be stated that after this application had been filed, the 1st respondent was adjudicated an insolvent, and all his properties have become vested in the Official Receiver, who has been brought on record as the 2nd respondent. The Official Receiver raised a number of contentions against the decree of the appellant being executed against the properties in question. It is sufficient for the disposal of this appeal to refer to one of them, namely, that the bond ceased to have any effect as soon as the decree of the first Court was passed, dismissing the appellant's suit. The circumstances under which the bond was given, we have already stated, namely, that it was under O. 38, R. 5. What that rule states is that the defendant should furnish security in such sum as may be specified under the order of the Court, to produce and place at the disposal of the Court when required, the said property (namely, the properties that are attached), or such portion thereof as may satisfy the decree which may be passed by the Court in the case. We have to construe the bond with reference to the circumstances under which it was executed as its language is not clear. The bond says " In pursuance of the order of the Court, dated 22nd March, 1918, in I. A. No. 68 of 1918 in the above suit, I have hereby given as security all the rights which I have in the property described hereunder for the aforesaid suit amount. In case the aforesaid suit is decided in favour of the plaintiff,

Subbarama Aiyar v. Subba Aiyar. Krishnan, J.

the under-mentioned property, myself and my heirs hereby bind ourselves to be responsible for the said amount. This security bond is executed for Rs. 5,000." The bond was executed to the Court. We have not before us the records of I. A. No. 68 of 1918 referred to in the bond. But evidently it was some order passed by the Court under R. 5, O. 38. Though the bond is worded somewhat widely it is clear that the respondent was giving security only for the decree that might be passed against him by the Court to which he gave the security. There can be no doubt that if he had not furnished security, and his property had been attached before judgment, such an attachment would have ceased to have any effect as soon as the Court dismissed the plaintiff's suit. See *Abdul Rahman* v. *Amin Sharif* (1). It seems therefore right to hold that the bond which really took the place of the attachment before judgment was meant to give security only for the purpose of enabling the First Court to execute its decree in case it passed a decree. As that Court did not pass a decree at all but dismissed the suit we consider that the Subordinate Judge was right in thinking that the bond ceased to have any further effect. This view is in conformity with the case reported in *Sheik Suleman* v. *Shivram Bhikaji* (2) followed in *Gallamudi Venkatasubba Row* v. *Chaparala Rosayya* (3) by a Bench of this Court. An earlier case in the Privy Council, *Ranee Birjobuttee* v. *Pertaub Singh* (4), raised a somewhat similar question with reference to the security given for a Privy Council Appeal. That appeal was dismissed by the Privy Council for default and then was restored. The question arose whether the security of Rs. 4,000 given for the appeal would continue as security for the subsequent proceedings in the Privy Council after the Privy Council had dismissed the original appeal. Their Lordships thought that it would not, and directed that a fresh security of £ 600 should be furnished by the appellant. Their Lordships were of opinion that when they dismissed the appeal in the first instance, the surety ceased to be bound, and therefore a fresh security was necessary.

A similar case was brought to our notice in *Moonshee Amir Ali Khan Bahadur* v. *Kasim Ali Khan* (5).

1. (1918) I L R 45 C 780.
2. (1887) I L R 12 B 71.
3. (1914) M W N 714.
4. (1860) 8 M I A 160.
5. (1870) 13 W R 403.

Subbarama Aiyar v. Subba Aiyar, Krishnan, J.

In this Court we have a case in *Errikulappa Chetti* v. *The Official Assignee of Madras* (6), where the money specified in the summons issued under O. 38, R. 5 was paid by the defendant into Court; their Lordships held that the decree-holder had no charge on that money as against the Official Assignee. This view seems to be somewhat in conflict with the view expressed in *Janaki Nagaswami Aiyar* v. *Ramaswami Aiyangar* (7), but we must follow the ruling in *Errikulappa Chetti* v. *The Official Assignee of Madras* (6) in preference to the one in *Janaki Nagaswami Aiyar* v. *Ramaswami Aiyangar* (7).

Our attention has also been drawn to the case in *Ramiah Aiyar* v. *Gopalier* (8). That case is not against the view we are taking. Here the security was given only for enabling the decree to be executed, if any decree was passed by the Court. In the case cited, money had been deposited under R. 2 of O. 38 to the credit of the action and it was held that the plaintiff who obtained a decree in the suit had a lien on the money. That case is not an authority here as the plaintiff here did not get a decree in the Court to which security was given.

Finally our attention was drawn to the decision of the Privy Council in *Raj Raghubar Singh* v *Jai Indra Bahadur Singh* (9). In that case no doubt there are some observations by their Lordships on page 164 which appear to be in favour of the appellant. Their Lordships construing the security bond in the case say that the construction that the security was confined to the Judicial Commissioner giving a decree for the mesne profits in the first instance was not proper as " according to it if the Court of the Judicial Commissioner had reversed the decree of the Subordinate Judge, but wrongly reversed it and been itself corrected on final appeal, so that the widow was really entitled to possession and the mesne profits, still the Court of the Judicial Commissioner having decided against her, the sureties would have had to pay to the defendant who had no title, the amount of the mesne profits from the date of the original decision to that of the intermediate Court of Appeal. This shows that the bond should not be construed too literally but reasonably with reference to its language and

6. (1915) I L R 39 M 903. 7. (1919) 11 L W 6.
8. (1918) I L R 41 M 1053 35 M L J 355. 9. (1919) I L R 42 A 158.

Subbarama Aiyar v. Subba Aiyar.

Krishnan, J.

the surrounding circumstances. If the decree is reversed by the appellate Court the security goes with it ; the security must therefore be taken to be for a subsisting decree only. " The observations of their Lordships must be read with the language and the circumstances of the instrument which they were construing. That was a case where security had been given for mesne profits on behalf of a widowed Rani, who was asking for possession of properties pending the appeal in the Judicial Commissioner's Court. She was directed to give security for mesne profits of the property, and the bond in question was the security that was given. The bond stated that the hypothecated property should serve as security and be liable to the extent of a lakh of rupees for carrying out the aforesaid purpose. It was argued before their Lordships that this security bond ceased to have effect as soon as the Judicial Commissioner dismissed the appeal to him. This argument was met by their Lordships by pointing out that there was really no difficulty on the language of the instrument as by it the sureties made themselves liable for any order that might be passed by the Judicial Commissioner, not the first order merely, but any order. The order for which the security was sought to be enforced was an order of the Judicial Commissioner himself though passed after remand and it fell within the language of the bond.

We cannot use this case as an authority for holding generally in all cases that whenever a bond is given as security to a Court for any decree that may be passed by that Court, it should be construed as meaning that the security was available for the proceedings not only in that Court, but also in the Courts of Appeal. That would really depend upon the language of the bond as construed with reference to the surrounding circumstances. In the present case we think the bond was given to take effect only if the attaching Court had passed a decree and that not having taken place, the appellant is not entitled to any charge upon the properties on the strength of the bond. The appeal therefore fails and is dismissed with costs of the 2nd respondent.

A. V. V *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Rachamadugu Venkatapathi (minor) by next friend Lakshmamma .. *Appellant** (*Petitioner*)

v.

K. Ramadas Rao (Receiver) .. *Respondent* (*Respondent*).

Venkatapathi *v.* Ramadas Rao.

Assignment—Lien or charge—Assignment for purposes of collection—Rights of assignor.

Where a person assigns to another for purposes of collection certain arrears of rent and other dues, the assignee agreeing to pay over to the assignor half the net proceeds after deducting the costs of collection, the assignment creates in favour of the assignor a lien in the nature of a trust or charge on the moneys received thereunder and the trust can be enforced as against the receiver of the assignee's estate in the event of his bankruptcy. The assignor is not in the position of an ordinary unsecured creditor in the insolvency.

Comfort v. *Betts,* (1891) 1 Q B 737 ; *Navajee* v. *Administrator-General of Madras,* I L R 38 M 500 relied on.

Appeal against the Order, dated 13th September, 1922, of the District Court of Anantapur in I. A. No. 235 of 1922 in I. P. No. 9 of 1920.

B. Sitarama Rao and *K. Srinivasa Rao* for appellant.

B. Somayya for respondent.

The Court delivered the following

Phillips, J.

JUDGMENTS :—*Phillips, J.* :—I agree with the order proposed by my learned brother and need only say that the decision of the Court of Appeal in 1891 in *Comfort* v. *Betts* (1) governs this case also. I may also refer to *Palaniappa* v. *Lakshmanan* (2) and *Navajee* v. *The Administrator-General of Madras* (3) as supporting this conclusion. The appellant is entitled to the money in Court as the assignment created in the assignor's favour a lien in the nature of a trust or a charge on the money recovered thereunder. The appeal is therefore allowed with costs throughout.

Odgers, J.

Odgers, J. :—On 23rd September, 1913, the Swami of Ahobilam Mutt assigned to Rangiah and Sanjeeviah the

1. (1891) 1 Q B 737. 2. (1893) I L R 16 M 429.
3. (1913) I L R 38 M 500.

*A A O No. 418 of 1922. 11th March, 1924.

Venkatapathi
v.
Ramadas
Rao.

Odgers, J.

amount due for rent and damages from one Ramappa who had leased certain lands belonging to the Mutt. The assignees were to collect the arrears of rent due from Ramappa, recover damages from him in respect of cutting trees, pay all the costs themselves in the first instance and pay over half the net proceeds to the Swami after deducting costs. Rangiah is now represented by minor petitioner-appellant and in 1915 Sanjeeviah was adjudicated an insolvent. Certain moneys have been recovered from the lessee and are in deposit in the District Court of Kurnool. The appellant states that he paid the Swami in 1919 Rs. 1,500 and took a deed of relinquishment whereby he acquired the Swami's half-share in the net proceeds provided for by the deed of assignment. The appellant asserts that the insolvent (now represented by the Official Receiver) is entitled only to 1|4th of the amount recovered; himself being entitled to the other 1|4th which, together with the 1|2 acquired from the Swami amounts to 3|4th of the fund in Court. The Official Receiver contends that he is entitled to 1|2 the decree amount and not 1|4th only and that as the Swami would as to his 1|2 under the assignment deed be in the position of an ordinary creditor, the appellant, by the transaction in 1919, can acquire no better rights against the insolvent's estate than the Swami had and must rank as an ordinary creditor. This contention was upheld by the District Judge and the question is whether it is right and whether under the deed of assignment the assignees were constituted trustees for the Swami as to 1|2 the proceeds they recovered. It is further contended that if they were not trustees they were agents for collection or that a charge was created on the fund recovered in favour of the Swami. In my opinion I think the assignment was an absolute one in favour of the assignees. "I do hereby assign to you, your heirs and assignees the amount now owing and hereafter falling due." It does not signify in this country whether the assignment is one at law by virtue of S. 25 of the Judicature Act of 1873 or is only an equitable assignment. A trust in favour of the assignor whether of the whole debt assigned or of the surplus after retention thereout of a definite sum by the assignee does not prevent the assignment being absolute in the case of an equitable assignment a direction to pay a sum of money out of a specified debt or fund constitutes such an assignment, though not of the whole debt or fund and it is

Venkatapathi v. Ramadas Rao.

Odgers, J.

immaterial that the amount of the debt assigned is not ascertained at the date of the assignment. *See* per Chitty, L. J. in *Durham Brothers* v. *Robertson* (4). This case appears to me to resemble *Comfort* v. *Betts* (1) where certain persons assigned debts due to them to the assignee to recover the same and on recovery to pay to the assignors respectively out of the aggregate sum recovered such proportionate part of such aggregate sum as should represent or comprise the individual debt due to them respectively or such part thereof as might have been recovered by the assignee. The Court of Appeal held that what was intended was an absolute assignment of the debts subject to a trust for the payment of the money recovered to the creditors. In my opinion this decision is applicable to this case ; the only difference here is the clause with regard to the recovery of damages, but as pointed out above that is not a matter which needs consideration in this country. The intention here was to pass the whole of the assignor's interest in the debt due and in the recovery of damages. He was however entitled to half the net proceeds recovered. The Court of Appeal has held in the case quoted that the intention in such a case imports a trust and following that decision I have no doubt that it was intended by the parties here to the deed of assignment that the assignees should hold half the proceeds in trust for the assignor. The Swami would therefore not be in the position of an ordinary unsecured debtor with regard to the proceeds and the appellant who stands in his shoes will occupy the same position.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Sinnaswami Chettiar *Appellant** (*Petitioner*)

v.

Aligi Goundan and others *Respondents* (*Creditors-Respondents*).

Sinnaswami Chettiar v. Aligi Goundan.

Provincial Insolvency Act (*V of* 1920), *Ss.* 23 *and* 31—*Insolvency—Right to apply for protection before adjudication.*

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1. (1891) 1 Q B 737.

4. (1898) 1 Q B 765.

*A A O No. 469 of 1923.

3rd April, 1924.

Sinnaswami Chettiar v. Aligi Goundan.

Under the Provincial Insolvency Act an insolvent is not entitled to apply for protection before adjudication, unless he has been actually arrested in execution of a decree.

Appeal against the order of the District Court of Coimbatore, dated the 26th September, 1923, and made in I. A. No. 268 of 1923 in I. P. No. 80 of 1923.

M. S. Vaidhyanatha Iyer for appellant.

S. S. Ramachandra Iyer for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal from the order of the District Judge of Coimbatore refusing protection to the appellant who has filed a petition in insolvency in that Court. The petition had been admitted but no order of adjudication had been made at the time the application for protection was made or even now. The learned Judge has refused protection on the ground that the insolvent had made two fraudulent transfers just before he made the application. We do not however propose to go into that question in appeal. S. 31 of the Provincial Insolvency Act deals with applications for protection only after the order of adjudication is made and that stage had not been reached in this case yet. The only other provision which deals expressly with what may be called protection before adjudication is S. 23. That section says, "At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of a decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary." The condition under which the Provincial Insolvency Act allows the Court to interfere between an insolvent and his judgment-creditors before adjudication is where a decree-holder has arrested him. An insolvent is not entitled to make an application under the Act for protection before he is adjudicated, unless he has been arrested, because there is really no necessity till then for any protection. If the insolvent wants to apply for protection, he ought to expedite matters in such a way as to get his order of adjudication first and then ask the Court to grant protection under S. 31. Neither the state of affairs contemplated by S. 31 nor by S. 23 has arisen in this case. We, therefore, think that there is no necessity to grant protection at this stage. If the insolvent is arrested hereafter, it

Sinnaswami Chettiar v. Aligi Goundan.

will be open to him to apply under S. 23 and we have no doubt that the Court will consider his case on the merits and not allow the order now passed by the District Judge to stand in the way of such consideration. Similarly if he gets an order of adjudication, he may apply under S. 31. But at this stage we do not think it is necessary to interfere. The appeal is therefore dismissed with costs.

A. V V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Bathula Pitchi Reddi and others. .*Appellants** (*Defts.* 3 *to* 5 *and* 7 *to* 9)

v.

Yellepeddi Bharata Sastri *Respondent* (*Plaintiff.*)

Pitchi Reddi v. Bharata Sastri.

Civil Procedure Code, S. 11—*Issue—Heard and finally decided—Decision on immaterial issues—Not* res judicata.

In a suit by reversioners for a declaration that certain alienations made by the widow of a deceased Hindu were not binding on the reversioners, the defence was that the suit was barred by limitation, and that the properties in question were not part of the estate of the last male owner. The trial Court raised issues on both the points but dismissed the suit expressly on the ground of limitation. With a view to avoid the necessity for a remand in case the appellate Court took a different view of the question of limitation, the trial Court gave a finding on the issue as to title against the plaintiffs. *Held,* that the finding on the question of title to the property was an *obiter dictum* and not *res judicata. D. Narasamma* v. *D. Kannaya,* (1881) I L.R 4 M 134 followed.

Appeal against the order of remand, dated 14th December, 1922, of the Court of the Subordinate Judge of Bapatla in Appeal Suit No. 131 of 1922 preferred against the decree of the Court of the Principal District Munsif of Bapatla in Original Suit No. 125 of 1920.

Ch. Raghava Rao and *A. Sundaram Aiyar* for appellants.

B. Somayya for respondent.

The Court delivered the following

JUDGMENT :—The question raised in this case is one of *res judicata.* The appellant represents the interests of one Pitchi Reddi. The respondent represents the interests of one

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*A A O No. 378 of 1923. 17th April, 1924.

Pitchi Reddi v. Bharata Sastri.

Rami Reddi. Rami Reddi and Bapi Reddi brought a suit, O. S. No. 372 of 1904, and got it declared that certain alienations by the widow in possession to Pitchi Reddi and to some others respectively were not binding upon the reversioners. In that suit Pitchi Reddi and the other defendants raised the question that the property did not belong to the widow's husband, and therefore the reversioners had no right to the properties. They also raised the question that the suit was barred by limitation. There were the two main questions raised in that case. The District Munsif came to the conclusion that the suit was barred by limitation and dismissed the suit expressly on the ground of limitation. He also gave a finding on the issue as to title against the plaintiffs-reversioners, holding that the properties did not belong to the estate of the deceased last male holder as alleged by them. But after coming to that finding he stated in his judgment that he recorded that finding for the purpose of preventing a remand, but that he really based his judgment upon the finding on limitation. It is the finding of the District Munsif in that suit on the question of title that is now claimed to make that question *res judicata* between the present parties. There was an appeal from the judgment of the District Munsif by one of the reversioners, Bapi Reddi; the other reversioner Rami Reddi was joined as the 5th respondent. So far as the second set of alienees were concerned the District Munsif's decree was confirmed on the finding that the suit was barred by limitation by the appellate Court. But the appellate Court expressed no opinion on the matter regarding Pitchi Reddi's claim as the matter ended in a compromise by which the decree of the first Court was set aside and the suit was decreed in appeal as per terms of the compromise, under which Pitchi Reddi agreed that Bapi Reddi should take the properties on the death of the widow, on the footing that the alienation to him did not cover more than the life-estate of the widow. There was a second appeal in the matter by Pitchi Reddi in the High Court in which this compromise decree seems to have been set aside and so far as Bapi Reddi was concerned the decree of the first Court was restored, Rami Reddi not being a party to the second appeal. This is how the matter stands. Now the Lower Court has held that the finding in the previous litigation as to title is not *res judicata* in the present litigation on the ground that the finding of the first Court as to title had been by implication set

Pitchi Reddi
v.
Bharata
Sastri.

aside by the appellate Court and the High Court's decree restoring the first Court's decree was not binding upon Rami Reddi, because he was not a party to the second appeal. Assuming for a moment that this view is not correct and the first Court's findings are still subsisting, we must still hold that the question of title has not been made *res judicata* by those findings. The finding of the first Court on the question of title was only a tentative decision, a sort of opinion expressed by that Court that the title was not in the person whom the reversioners put forward. The District Munsif said, after finding on the question of title in favour of the alienee in paragraph 17 of his judgment, that the finding on the first issue was beside the point and that he ought not to have recorded the finding, but for saving the suit from being remanded in case the appellate Court disagreed with him in his finding on the other issue. He then considered the question of limitation and found that the plaintiff's suit was barred by limitation and dismissed the suit. It is clear after this statement of the Munsif that he did not intend to base his judgment at all upon the question of title, his finding therefore can only be treated as an *obiter dictum* and not as *res judicata* at all. For a finding to become *res judicata* it is necessary that the points should have been heard and finally determined. When a Court merely for the purpose of preventing a remand records a conclusion on an issue not necessary for the decision, we cannot hold that it has finally determined the question. This point was decided by the Madras High Court in *D. Narasamma* v. *D. Kannaya* (1). Their Lordships held "The words in S. 13 of the Code of Civil Procedure 'has been heard and finally decided by such Court,' do not apply to an opinion expressed in the judgment on other issues not material for the purpose of the decree, though properly determined under S. 204 of the Code of Civil Procedure by the Court of first instance." That is, if the decree is not based upon a particular finding that finding cannot be treated as *res judicata*. We therefore agree with the Subordinate Judge in thinking that there is no *res judicata* in this case and dismiss the appeal with costs.

A. V. V. *Appeal dismissed.*

1. (1881) I L R 4 M 134.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Kallepalli Pallayya (dead) by L. R. Maddirala Ramanamma. *Appellant** (*1st counter-petitioner—Plaintiff's L. R.*)

v.

Karri Bhimaraju and another. *Respondents* (*2nd counter-petitioner, 1st defendant and petitioner—2nd defendant*).

Pallayya *v.* Bhimaraju.

Limitation Act, Art. 181—Restitution by party who was exonerated from decree but whose property was nevertheless sold—Application for—Limitation—S. 18 of Limitation Act—Case under—Allegations necessary for raising.

Where, though a party was exonerated from the decree, his property was nevertheless sold, *held,* he was entitled to restitution, and his application therefor was governed by Art. 181 of the Limitation Act, the starting point being the date of the sale.

The application for restitution was made after the expiration of the three years allowed for the purpose but the applicant alleged in his petition that the decree-holder fraudulently proceeded against applicant's share also without serving notice on him, and that as notice was thus fraudulently suppressed the applicant only came to know of the sale in 1921, when the application was made. *Held,* that those allegations raised a case under S. 18 of the Limitation Act, that there was a continuing fraud up to the date of the application, and that it was therefore not barred.

Appeal against the Appellate Order of the Court of the Additional Subordinate Judge of Cocanada in A. S. No. 17 (*a*) of 1922 preferred against the order of the Court of the District Munsif of Ramachandrapur in C. M. P. No. 1390 of 1921 (in O. S. No. 554 of 1912 of the Cocanada District Munsif's Court).

C. Rama Rao for appellant.

P. Somasundaram for respondents.

The Court delivered the following

JUDGMENT :—Appeal from the order of the Additional Subordinate Judge of Cocanada in Appeal No. 17 (*a*) of 1922 in C. M. P. No. 1390 of 1921 of the Court of the District Munsif of Ramachandrapur.

Petitioner applied to set aside the sale of property sold under the decree in O. S. No. 554 of 1912 of the Cocanada District Munsif's Court. So far as his share is concerned,

*A A A O No. 16 of 1923. 1st August, 1924.

Pallayya v. Bhimaraju.

the lower Courts allowed the application. Counter-petitioner appeals.

The petitioner had been exonerated from the decree, but nevertheless his property was sold and there must admittedly be restitution unless his application can be shown to be time-barred. The sale was in 1915 and the application in 1921. There can be no doubt in the light of *Rajagopala Aiyar* v. *Ramanujachariar* (1) that Art. 181 of the Limitation Act applies and petitioner will be time-barred unless he has pleaded and established facts which save him from the bar. I agree with the appellant that he cannot set up a new case in appeal but the point for determination is whether that was actually done, and whether a case under S. 18, Indian Limitation Act, has been established. In the 5th paragraph of his petition, the petitioner sets forth that in spite of the compromise which exonerated him from the decree, the counter-petitioner fraudulently proceeded against the entire property without serving notice on the petitioner. As notice was thus fraudulently suppressed the petitioner only came to know of the sale in August, 1921. This contains all that is necessary to attract the provisions of S. 18, Indian Limitation Act, to petitioner's case, and I cannot hold it to be a fatal flaw that he has not specifically referred to this section. The counter-petitioner then contends that even supposing there was fraudulent suppression of notice at the time of the sale, no subsequent fraud is alleged and therefore petitioner was not fraudulently kept out of knowledge of the sale. This point was taken in the lower appellate Court and I agree with the learned Subordinate Judge that there was a continuing fraud up to the date of petitioner's knowledge. The case cited by appellant, *Payidanna* v. *Lakshminarasamma* (2), hardly helps him. There at the time of the sale, a minor was treated as major, a circumstance which did not exactly keep the minor from knowledge of the sale.

Accordingly I see no reason to differ from the finding of the lower Courts, but appellant asks that the order may apply to the share of the 2nd defendant only, that of 1st defendant having been validly sold. There seems to be no objection to this modification, and I order accordingly.

Costs to 2nd defendant.

A. S. V *Appeal allowed.*

1. (1923) I L R 47 M 288 . 46 M L J 104. 2. (1914) I L R 38 M 1076.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

A. L. A. R. Arunachalam Chettiar, through his authorised agent Pichappa Chettiar .. *Petitioner** (*Plaintiff*)

v.

Latchumanan Chettiar and others. *Respondents* (*Respondents and 3rd respondent's L. Rs. Plaintiffs 2 and 3 and deceased defendant and his L. R.*).

Arunachalam Chettiar *v.* Latchumanan Chettiar.

Limitation Act, Art. 182—Execution of decree—Limitation—Step-in-aid of execution—Batta for process—Payment of—Batta memo. not applying for issue of process—Effect.

The payment of process fees for issue of a warrant of arrest in execution of a decree, where the batta memo. itself does not apply for the issue of process, is not a step-in-aid of execution so as to save limitation.

Petitions under S. 25 of Act IX of 1887 praying the High Court to revise the orders of the Court of the District Munsif of Satur in E. P. No. 93 of 1920 and E. P. Nos. 90 and 94 to 96 and E. A. No. 80 of 1920 respectively in S. C. S. Nos. 1110, 1030 to 1032, 1026, 1092, 1029 and 1025 of 1913.

K. Balasubramania Aiyar for petitioner.

The Court delivered the following

JUDGMENT :—The short question for decision in all but two (C. R. P. Nos. 117 and 156 of 1921) of these Civil Revision Petitions is whether the payment of process fees for issue of a warrant of arrest in execution of a decree is a step-in-aid of execution so as to save limitation.

The execution petitions under consideration were presented on 12th February, 1920, and the previous execution petitions were presented on 9th January, 1917, more than three years before. In the course of the latter petitions batta memos. for warrant of arrest were put in on 21st February, 1917 and 23rd March, 1917. The question is whether the filing of these batta memos. is a step-in-aid of execution. The District Munsif held that it was not. The decree-holders have put in

*C R P. Nos. 117 to 123 and 156 of 1921. 24th July, 1924.

Arunachalam Chettiar v. Latchumanan Chettiar.

these Civil Revision Petitions. The respondents, the judgment-debtors, do not appear.

A step-in-aid of execution has been defined in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) as an application which is not an initial application for execution, but an application to take some step to advance an execution petition already pending. Whether a formal application is in all cases necessary is a matter of some doubt. There is no direct authority whether a mere payment of process fees for an arrest warrant without a formal application for the issue of warrant is a step-in-aid ; but there are cases analogous to this in which different High Courts take different views. This High Court in *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (2) has held that a batta memo. which applies for the issue of a sale proclamation and on which a sale proclamation is issued is a step-in-aid. From the report in that case it appears that the batta memo. itself asked that process may issue and the learned Judges in that case in consequence distinguish it from the Full Bench case in *Malukchand* v. *Bechar Natha* (3) in which there was nothing more than the payment of batta, there being no application either written or oral. *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (2) followed the case in *Ambica Pershad Singh* v. *Surdhari Lal* (4) in which also there was an application for the issue of a sale proclamation. The previous case in Madras, *Bellayya* v. *Jaganatha* (5) is inconclusive, but seems to have held that the payment of stamps for the transmission of records for the purposes of execution to another Court would not amount to a step-in-aid unless there was an application. Two Calcutta cases seem to adopt rather a different view. In *Radha Prosad Singh* v. *Sundar Lal* (6) it was held that the deposit of costs for bringing property to sale is a step-in-aid without a formal application, and in *Narendra Nath Padhari* v. *Bhupendra Narain Roy* (7) it was held that the deposit of process fees for service of a sale proclamation is in itself a step-in-aid. Another Calcutta case reported in *Bhupendra Narayan Dutt* v. *Rajendra Nath Dutt* (8) follows these two rulings and holds that a payment of process fees paid at the instance of the Court after a notice

1. (1921) 42 M L J 303.
2. (1905) I L R 28 M. 399.
3. (1901) I L R 25 B 639 (F B).
4. (1884) I L R 10 C 851 (F B).
5. (1883) I L R 7 M 307.
6. (1883) I L R 9 C 644.
7. (1895) I L R 23 C. 374.
8. 18 I C 455.

had been served and a sale proclamation issued, imported a request to the Court to proceed with the execution and therefore was a step-in-aid. It is a little curious that the *Radha Prosad Singh* v. *Sundar Lal* (6) and *Narendra Nath Padhari* v. *Bhupendra Narain Roy* (7) cases were not cited before the Full Bench in *Malukchand* v. *Bechar Natha* (3) when other cases from the seven volumes were cited. In *Sheo Prasad* v. *Indar Bahadur Singh* (9) it was held that the payment of process fees for attachment without an application is not a step-in-aid. I think the case in *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (2) indicates the then view of this Court that a mere payment of batta for process, where the batta memo. itself does not apply for the issue of process, will not be a step-in-aid, and I think that it is more essential in such matters that there should be uniformity of practice in each Presidency than that there should be unanimity in the views of different High Courts.

In the present memo. I find no prayer for the issue of process. I am asked to infer that there must have been one because the Court has under O. 21, R. 37, Civil Procedure Code, discretion not to issue a warrant at once. But there is nothing to show that if it did after deliberation or on application order the issue of a warrant, that application was within three years of the Execution Petition of 1920. I am therefore not prepared to interfere in these cases and dismiss the petition.

In two cases which I excepted at the beginning—C. R. Ps. 117 and 156 of 1921—the case for the petitioner is much weaker. The process memos. there were merely for the issue of a notice to the 2nd plaintir and not to the judgment-debtors at all. Clearly this was not a step-in-aid of execution and these petitions are also dismissed.

A. S. V. *Petitions dismissed.*

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2. (1905) I L R 28 M 399.
3. (1901) I L R 25 B 639 (F B).
6. (1883) I L R 9 C 644.
7. (1895) I L R 23 C 374.
9. (1908) I L R 30 A 179.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

• PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

V. Krishna Aiyar — *Petitioner**

v.

Pachaiyappa Chetti and others — *Respondents.*

Krishna Aiyar *v.* Pachaiyappa Chetti.

*Civil Procedure Code, O. 1, R. 8—Object of—Applicability—Conditions—Right to sue in original plaintiff and community of interest between him and members of the class—Suit in name of wrong plaintiff—Effect—O. 1, R. 10—Application of—Conditions—*Bona fide *mistake in institution of suit—Necessity—Pleadings—Amendment of, by introducing case of fraud—When granted and when not.*

The plaintiff, describing himself as a creditor of a person who had been adjudicated an insolvent, and whose estate was represented by the Official Assignee of Rangoon, sued for a declaration that a sale deed executed by the Official Assignee in favour of the defendant was null and void. The defendant pleaded that the plaintiff was not a creditor of the insolvent and had no *locus standi* to maintain the suit.

When the trial was about to commence, one *K*, who had all along represented the plaintiff, applied to be added as a plaintiff to obviate the technical objection raised by the defendant.

Held, that if the plaintiff was not a creditor of the insolvent, the application was not sustainable under O. 1, R. 8, Civil Procedure Code ; that, if the plaintiff was a creditor, the assumed necessity for the application did not exist and it equally failed ; and that the application could not be allowed under O. 1, R. 10, as there was no allegation even that the suit was instituted originally in the name of a wrong person through a *bona fide* mistake.

O. 1, R. 8, Civil Procedure Code, presupposes the existence of a right of suit in the plaintiff who instituted the suit, and the community of interest between him and the others of the class is the prerequisite necessary to enable him to represent the class. If the plaintiff turns out not to be a member of the class on whose behalf he professed to institute the suit, the suit is not a representative suit and no member of the class is constructively a party to it.

Quaere : Whether O. 1, R. 10, Civil Procedure Code, applies to cases falling within O. 1, R. 8.

On the same date on which the abovementioned application was made, another application was made by the original plaintiff for leave to amend his plaint by saying that the defendant was a *benamidar* for the insolvent and that the agent of the Official Assignee who conducted the sale on his behalf made a pretence of selling the property by public auction but really sold the property by private contract to the insolvent, the defendant being merely a *benamidar* for the insolvent. The materials, if any, which substantiated the allegations of fraud, thus sought to be added, were not referred to in the affidavits filed in support of the application.

*C. R. P. Nos. 253, 580 and 579 of 1923. 19th March, 1924.

Krishna Aiyar v. Pachaiyappa Chetti.

Held, that in the circumstances and in view of the great delay in making the application from which want of *bona fides* might be inferred, the Court below was right in rejecting the application.

Petitions under S. 115 of Act V of 1908 praying the High Court to revise the orders of the Court of the Subordinate Judge of Sivaganga, dated 25th January, 1923, in I. A. Nos. 95, 93 and 94 of 1923 respectively in O. S. No. 15 of 1920 now transferred to the Court of the Additional Subordinate Judge of Sivaganga and numbered as O. S. No. 12 of 1923 on his file.

G. Krishnaswami Aiyar and *R. Swaminatha Aiyar* for petitioner.

C. S. Venkatachari for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff instituted the suit for a declaration that the sale deed, dated the 16th September, 1919, executed by the Official Assignee of Rangoon in favour of the defendant is null and void. He described himself in the plaint as a creditor of T. A. R. A. R. M. Ramanathan Chetti who was adjudicated an insolvent and whose estate was represented by the Official Assignee above mentioned. This suit was filed on the 15th of January, 1920. Among other pleas, the defendant stated that he did not admit that the plaintiff was a creditor of the insolvent firm. Issues were framed on the 30th March, 1920, and the third issue runs thus :—

" Whether the plaintiff was one of the creditors of the insolvent Ramanathan Chetty, and, if so, whether he has no cause of action to maintain this suit ? "

The trial was about to commence in January, 1923, and on the 24th of January, one Krishnier made an application to the Court for the purpose of being added as a plaintiff to the action. I may state that the plaintiff is a Nattukottai Chetti and was represented throughout by this Krishnier. The reason why he desired to be added as a party is set forth in para. 4 of his affidavit, dated 24th January, 1923. " The defendant has taken the objection that the plaintiff is not a creditor of the insolvent firm and has no *locus standi* to maintain the suit. In order to obviate any technical objection on that ground, it is necessary in the interests of justice that this Hon'ble Court should be pleased to join me as a plaintiff and

Krishna Aiyar *v.* Pachaiyappa Chetti.

I am willing to continue the suit from the stage which it has now reached."

Mr. G. Krishnaswami Aiyar, the learned Vakil for the petitioner, has contended that the suit having been instituted under O. 1, R. 8, Civil Procedure Code, was a representative suit filed in the interests of the creditors of the insolvent, that therefore Krishnier was throughout constructively a party to the proceedings, that the application in effect was to place Krishnier on the record *eo-nominee* as a party and that in making the application he was merely taking advantage of the provision contained in cl. 2 of R. 8. If this argument is correct, in my opinion there will be very little difficulty in acceding to the request. But the question is, is Krishnier a party to the proceeding at all? Is he a party although on the record his name does not appear? The answer to this question will depend upon the construction of O. 1, R. 8. The object of this provision is that in certain cases one person or a few persons should be allowed to represent all persons interested in a suit. The rule is in fact an exception to the general rule that all persons interested should be made parties to a suit. It pre-supposes the existence of a right in the plaintiff. It assumes that under the substantive law, the plaintiff has a right of suit and the rule enables him to represent the whole body of persons whom he seeks to represent. The rule says "Where there are numerous persons having the same interest in one suit, one person may sue on behalf of all persons so interested." The "one person" indicated in the rule is the person who has an interest common to himself and the body whom he professes to represent. The community of interest between him and the others of the class is the pre-requisite necessary to the end proposed. It is not any person that may sue on behalf of a class, but it is that person who has an interest which is the same as that possessed by the whole body of persons. "Given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent." [Judgment of Lord Macnaghten in *Bedford, Duke of* v. *Ellis* (1)]. If this condition is found wanting, if the plaintiff turns out not to be a member of the class on whose behalf he professed to institute the suit, I am of the

1. (1901) A C 1 at 8.

Krishna Aiyar v. Pachaiyappa Chetti.

opinion that the suit is wrongly constituted. The permission to sue is given by the Court on the assumption that the plaintiff is a member of the class and if the assumption is shown to be wrong the suit is not a representative suit and no member of the class is constructively a party to it. On the assumption, therefore, that the plaintiff in the present suit is not a creditor of the insolvent, O. 1, R. 8 has no application.

The following observations of Knight Bruce, L. J. in *Burt v. British Life Assurance Association* (2) are very relevant in this connection "He has sued on behalf of himself and others, and notwithstanding what has been contended on the part of the defendants, I assume that there still exist persons who have a right to complain of these transactions. But that will not give the plaintiff a title to sue for them. As on one hand a plaintiff who has a right to complain of an act done to a numerous society of which he is a member is entitled effectually to sue on behalf of himself and all others similarly interested though no other may wish to sue, so, although there are a hundred who wish to institute a suit and are entitled to sue, still if they sue by a plaintiff only, who has personally precluded himself from suing, that suit cannot proceed. The present case in my opinion stands upon the same footing as if the dissatisfied share-holders (supposing them to be dissatisfied) had sued by a plaintiff who had released the defendants." Lord Justice Turner concurs and the law is stated in the same terms in Daniel's *Chancery Practice*, p. 179.

If the plaintiff is a creditor, the assumed necessity for this application does not exist and it equally fails.

It is next contended that Krishnier may be made a party under O. 1, R. 10. I do not propose to discuss the applicability of this rule to cases falling within O. 1, R. 8. It is sufficient to say that it must be alleged and proved, that the suit was instituted originally in the name of a wrong person through a *bona fide* mistake and that element is utterly wanting in the present case. No allegation is made that the mistake was *bona fide*. As a matter of fact, no materials—absolutely none—are placed before the Court from which an inference can be drawn in favour of the plaintiff. This application cannot therefore be allowed under O. 1, R. 10. I may, in

2. 4 De G and J 69 S C 45 E R 62.

Krishna Aiyar v. Pachaiyappa Chetti.

passing, mention that in the lower Court only this provision was relied on and that reference to O. 1, R. 8 was made only in the course of the arguments before me. Civil Revision Petition No. 253 of 1923 therefore fails and is dismissed.

Another application was made on the same date, namely, 24th January, 1923, by the original plaintiff himself for permission to amend the plaint. Paragraph 5 of the plaint runs thus :—

"The plaintiff states that the Official Assignee of Rangoon has, through private negotiations conducted by the Official Receiver of Ramnad, conveyed the undermentioned properties for a grossly inadequate value of Rs. 12,000 and has executed a sale deed in favour of the defendant though several creditors of the insolvent including the plaintiff, protested against such a sale and offered much higher price."

He proposes to amend the plaint by saying that the defendant was a *benamidar* for the insolvents and that T. S. Ramaswami Aiyangar who conducted the sale as agent of the Official Assignee of Rangoon made a pretence of selling the property by public auction but really sold the property by private contract to the insolvents, the defendant being merely a *benamidar* for them. Thus allegations of fraud are proposed to be added. The law is stated thus in *Annual Practice*, page 451 :—"Thus if either party seeks to amend his pleading, by introducing for the first time allegations of fraud, etc., the Court will ask why this new case was not presented originally and may require to be satisfied as to the truth and substantiality of the proposed amendment." The materials, if any, which substantiate the allegations of fraud have not been referred to in the affidavits. In the circumstances and having regard to the great delay in making this application from which want of *bona fides* may be inferred I am not disposed to interfere with the order of the lower Court. C. R. P. No. 580 of 1923 accordingly fails and is dismissed.

Then there is a third application made by the plaintiff on the same date for adding the Official Assignee of Rangoon as a party-defendant. The defendant contends that the plaintiff's object in making this application is to delay the trial. As a matter of fact the learned vakil for the petitioner says that he wants no relief against the Official Assignee but that for enabling the Court to do complete justice between the parties his

Krishna Aiyar v Pachaiyappal Chetti.

presence is necessary. He says, if the plaintiff obtains a decree setting aside the sale and if the Court directs the refund of the purchase money to the defendant, it may then become necessary to have the Official Assignee on the record. The answer is that if the plaintiff obtains the decree, it will be open to him to move the Insolvency Court for directions to the Official Assignee to pay the money. I do not think at this late stage this application ought to be granted. C. R. P. No. 579 of 1923 therefore fails and is dismissed.

The petitioner will pay the defendant's costs in all the C. R. Ps. (Three sets of costs).

A. S. V. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

Pogula Hussain Reddy *Appellant** (*2nd Defendant*)

v.

Yasaggari Venkata Reddy and others *Respondents* (*Plaintiffs* 2 *and* 3 *and Defts. Nos.* 8, 1, 3 *and* 5 *to* 7.)

Hussain Reddy v. Venkata Reddy.

Hindu Law—Widow—Alienation—Suit by presumptive reversioner challenging —Representative nature of —Death of widow—Suit by actual reversioner for possession—If barred—Civil Procedure Code, S. 11, *Expl. VI.*

Where a Hindu widow makes an alienation and a contingent reversioner files a suit for declaring the same to be invalid, the suit is a representative suit on behalf of all the reversioners and the decision therein is binding on all of them. Where such a declaratory suit is dismissed, a suit by the actual reversioner after the death of the widow for possession of the properties alienated is barred by *res judicata. Venkatanarayana Pillai* v. *Subbammal,* I. L. R. 38 Mad. 406; *Varamma* v. *Gopaladasayya* I. L. R. 41 Mad. 659; *Kisho Prasad Singh* v. *Sheo Pargash Ojha* I. L. R. 44 All. 19 and *Pramatha Nath Basu* v. *Bhuban Mohan Basu* I. L. R. 49 Cal. 45 followed.

Appeal against the Order of the Court of the Subordinate Judge of Kurnool, dated 6th July, 1923 in A. S. No. 29 of 1923 (A. S. No. 83 of 1922, District Court, Kurnool) prefer-

* A. A. O. No. 381 of 1923. 17th July, 1924.

Hussain Reddy v. Venkata Reddy.

Wallace, J.

red against the decree of the Court of the District Munsif of Nandyal, dated 27th March, 1920, in O. S. No. 731 of 1920.

The Judgment of the Court was delivered by

WALLACE, J. :—This is an appeal against an order of remand by the lower appellate Court sending back a suit for trial by the first Court. The plaintiffs, who are respondents 1 and 2 here, sued in 1920 to establish their right to, and to recover possession of, 2|3 share of the suit property. The property belonged to one Chinnayya who died without issue leaving a widow. She sold the property to the 1st defendant's father in 1886 and died in 1920. The plaintiff's suit was filed after her death, the plaintiffs being the actual reversioners then. Their claim is met *in limine* by defendants 1 to 7, who now represent the alienee, on the plea of *res judicata*.

It is not disputed that the father of plaintiffs 1 and 2 at the time when he was a presumptive reversioner to the widow in 1898 filed O. S. No. 320 of 1898 against the widow and her alienee for a declaration that the alienation was not binding on the reversioners, and that he lost that suit. The first Court has held that, as that suit was a representative suit, the result of it will bind the plaintiffs and is an effectual bar to their getting a decree in this suit. The lower appellate Court held that a decree in a previous declaratory suit does not bind a reversioner when he has reached the status of an actual reversioner suing *for possession* unless he was himself an actual party to the declaratory suit. It therefore remanded the suit for hearing.

We think that the Lower Appellate Court's view of the Law as it now stands is wrong.

The Lower Appellate Court and the respondents here rely on certain dicta in some early Privy Council cases at a time when the law was that only the nearest reversioner had any right of suit and before it was clearly laid down by this Court that a declaratory suit by a contingent reversioner is a representative suit on behalf of all reversioners. In *Venkatanarayana Pillai* v. *Subbammal* (1), the Privy Council has clearly laid down the principle that the cause of action for such a suit is the common injury to the reversionary right. The question for decision in that case was whether when a presumptive reversioner, the plaintiff in such a suit, dies, the suit may or may

1. (1915) I L R 38 M 406 : 28 M L J 535 (P C).

not be continued by the next contingent reversioner. The Privy Council held that it could, because the right to sue survived, it being a common right inherent in all reversioners, and, touching for a moment on what was then the law in Madras as laid down by the Madras High Court, *viz.*, that the adjudication on an alienation in a suit by a presumptive reversioner did not operate as *res judicata* against a contingent reversioner, the Judicial Committee held that such a test for determining whether a contingent reversioner is entitled to continue the suit of a presumptive reversioner was irrelevant. The Privy Council therefore neither commended nor condemned in so many words the law as to *res judicata* in such suit as then laid down by the Madras High Court, but it did lay down emphatically that the right of all contingent reversioners is one and the same, a single cause of action. In *Varamma* v. *Gopaladasayya* (2), a Full Bench of this Court has logically followed up that line of reasoning and laid down that such a suit by one contingent reversioner is a representative suit on behalf of all. The previous Madras and Privy Council decisions have all been considered in that case and the proposition set out above was adopted in the clearest terms.

The respondents seek to distinguish this case on the ground that it merely decided the legal position *inter se* of contingent reversioners before the death of the widow who are entitled to sue only for a declaration and that the legal position is entirely changed when the widow is dead and the party bringing the suit is the actual reversioner entitled to sue for possession. Reliance is placed on a statement of Sadasiva Aiyar, J. at p. 677, that so far as suits for possession on the death of the female heir are concerned, the assistance of the legislature, that is, an enactment that a decree obtained by the then nearest reversioner is binding on the remoter reversioner, is still necessary. This does not appear to us to assist the respondents. The dictum is directed towards preventing a multiplicity of suits by actual reversioners, one after another, after the death of the widow and it has nothing to do with the effect on a suit by an actual reversioner of a decree in a previous declaratory suit.

2. (1917) I L R 41 M 659 : 35 M L J 57 (F B).

Hussain Reddy v. Venkata Reddy.

Wallace, J.

It is obvious and this is where the Lower Appellate Court is in some confusion that the cause of action of the actual reversioner is different from the cause of action for a suit by a contingent reversioner, and there is therefore no bar in law to the suit founded on the former cause of action. The question for decision is, whether, *when that suit is brought* it must not fail *in limine* where it has already been decided in a declaratory suit, representative of all reversioners, that the alienation is binding on all reversioners. We think there can be only one answer to this. If a declaratory suit is representative of all reversioners, all are bound by it, and the death of the widow cannot break that bond. To meet this argument Mr. Somayya for the respondents 1 and 2 had eventually to fall back on the contention that the word 'representative' in *Varamma* v. *Gopaladasayya* (2) was a misnomer and that it only meant to imply that all contingent reversioners had the same and a single cause of action, so that when one died, another could take his place. We are not prepared to accept this contention. It is quite clear from the judgemnt that the learned Judges were under no misapprehension and that they clearly and with full knowledge laid down the proposition that a decree in a declaratory suit by a contingent reversioner binds all reversioners. There is no question of the bond being only for a limited period. It would be a *reductio ad absurdum* if the decree in such a declaratory suit were reduced to waste paper merely by the widow's death, except in the one case where the plaintiff in each suit was the same. Such a decree could in no sense be termed a representative decree.

It is clear then that the actual reversioner is, unless and until he gets it set aside, bound by any decree passed in a previous declaratory representative suit by a contingent reversioner. It is a case to which Explanation VI of S. 11 of the Civil Procedure Code clearly applies.

That is the view held by the Allahabad High Court in *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (3) and the Calcutta High Court. See *Pramatha Nath Basu* v. *Bhuban Mohan Basu* (4). We are therefore of opinion that the view of the District Munsif on this point is correct and must prevail.

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2. (1917) I L R 41 M 659 : 35 M L J 57 (F B).
3. (1921) I L R 44 A 19 (F B). 4. (1921) I L R 49 C. 45.

Hussain Reddy v. Venkata Reddy. — Wallace, J.

The respondents have raised another contention, namely, that it is open to them to agitate the question whether the decision in O. S. No. 320 of 1898 was not due to laches and to collusion on the part of the then reversioner-plaintiff in that suit. The District Munsif says distinctly that they did not allege any such contention before him. The respondents say that that is a misstatement, but we are not prepared to go behind the statement of the District Munsif and we note that neither in the plaint nor in the issues has any such point been raised.

We therefore reverse the order of the lower appellate Court and dismiss the plaintiffs' suit with costs throughout in all Courts.

T. S. V. *Order reversed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Akshia Pillai *Appellant** (*1st respondent-plaintiff*)

v.

Govindarajulu Chetti and others *Respondents* (*Petitioner—7th defendant auction-purchaser*).

Akshia Pillai v. Govindarajulu Chetti.

Civil Procedure Code, Ss. 47, 151 *and O.* 21, *R.* 90—*Second appeal—When lies—Auction sale set aside under inherent powers of Court—Sale contrary to order of Court—Effect.*

An application to set aside an auction sale was dismissed by the District Munsiff on the ground that there was no evidence of fraud or material irregularity. On appeal the District Judge agreed with the findings of the Court below, but holding that the sale was in contravention of a prior order of Court which had become final, set aside the sale under his inherent powers. *Held,* the order of the District Judge was not one under O. 21, R. 90, but under S. 151 and an appeal lay to the High Court.

In the case of an application to set aside an auction sale there is no second appeal when a Court approached under S. 47 acts under O. 21, R. 90. But when it is so approached and exercises its inherent power under S. 151 there is a second appeal. 33 I. C. 692 ; 38 Cal. 339 ; 27 M. L. J. 605 ; 30 M. L. J. 611 ; 3 Pat. L. J. 645 referred to.

Where the parties disputing the sale are parties to the suit they approach the Court under S. 47, which decides the forum and not the scope of the jurisdiction.

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*A. A. A. O. No. 81 of 1922 and 12 of 1923. 21st July, 1924.

Akshia Pillai v. Govindarajulu Chetti.

Civil Miscellaneous Second Appeals against the Order of the District Court of Chingleput in Miscellaneous Appeal No. 4 of 1921, preferred against the order of the Court of the Principal District Munsif of Chingleput in C. M. P. No. 453 of 1923 in O. S. No. 182 of 1912.

M. S. Venkatarama Aiyar for appellant.

E. Vinayaka Rao for respondents in A. A. A. O. No. 81 of 1922.

S. Jagadisa Aiyar for appellant.

M. S. Venkatarama Aiyar and *E. Vinayaka Rao* for respondents in A. A. A. O. No. 12 of 1923.

The Court delivered the following

JUDGMENT :—Appeal against an appellate order setting aside a Court sale.

The Principal District Munsif of Chingleput in C. M. P. No. 453 of 1920 dismissed the application of the present respondents under O. 21, R. 90, holding that there was no evidence of fraud or irregularity. On appeal the District Judge found that the judgment-debtors had no cause for complaint on the score that lots 1 and 2 were sold for a low price, nor were they adversely affected as regards the remaining lot 3. There was therefore no substantial injury. He records no finding as to fraud apparently agreeing with the lower Court that there was no proof. He thus practically confirms the order under O. 21, R. 90. But in his sixth paragraph he finds that the lower Court's orders on M. P. No. 230 of 1917 were not brought to the notice of the Court which directed the sale and inasmuch as the sale was in contravention of the orders under M. P. No. 230 of 1917, which were final, the sale must be set aside. This is to break fresh ground. The judgment-debtors cited the failure to bring the previous petition to the lower Court's notice as evidence of plaintiff's fraud—Affidavit in M. P. No. 453 of 1920, paragraph 6. But the District Judge does not find that there was fraud ; he merely finds that the sale was in contravention of the orders under M. P. No. 230 of 1917. There is no objection to the Judge when the sale was before him upon appeal considering its validity from every point of view [cf. *Palaniappa Udayan* v. *Arumuga Pandaram* (1).] and exercising his inherent jurisdiction. The

1. (1916) 1 M W N 256 : 33 I C 692.

ruling that a Court must confine itself to S. 311 of the old Code, [*Harbans Lal* v. *Kundan Lal* (2)] was before anything like S. 151 was embodied in the statute. And if the Judge decides to set the sale aside not on the ground of material irregularity occasioning substantial injury, but merely on the ground that an order has been violated, he cannot be said to be acting under O. 21, R. 90. He must be acting under his inherent powers. That being so an appeal will lie to this Court, although no second appeal lies from an order under O. 21, R. 90, *Asimaddi Sheik* v. *Sundari Bibi* (3). The action of the District Judge is very similar to that discussed at page 610 by Tyabji, J., in *Muthia Chettiar* v. *Bava Saheb* (4). Oldfield, J., in the same case page 606 quotes the appellant as urging that remedies lie alternatively under O. 21, R. 90, or S. 47. This argues some confusion. If the parties disputing the sale are parties to the suit they approach the Court under S. 47, which decides the forum. The Court then proceeds according to its statutory powers. It may exercise its inherent jurisdiction under S. 151, or it may exercise its power under O. 21, R. 90. These are really the alternative provisions and this is presumably what is meant in *Palaniappa Udayar* v. *Arumuga Pandaram* (1), "O. 21, R. 90, must be read with S. 47, Civil Procedure Code," etc. Again in *Anantaramier* v. *Kuttimalu Kovilamma* (5) "one must presume at the outset that S. 47 always applies." If it is coupled with O. 21, R. 90, no second appeal lies. That is to say there is no second appeal when a Court approached under S. 47 acts under O. 21, R. 90. But when it is so approached and exercises its inherent power under S. 151 there is a second appeal. In *Sheik Maula Bux* v. *Raghubar Ganjhu* (6) it has been held that if a Court professing to act under S. 47 sets aside a sale there can be no second appeal because O. 43 gives a right of appeal against all orders setting aside sales. But O. 43 is hardly so comprehensive. It gives a right of appeal against orders under R. 72, or 92 of O. 21, but not in cases where the Court is acting under Ss. 151 and 47. This finding that an appeal lies practically disposes of respondent's case for the order of the Lower Appellate Court is based on an entire misapprehension of facts. Even

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1. (1916) 1 M W N 256 : 33 I C 692 at 694. 2. (1898) I L R 21 A 140.
3. (1911) I L R 38 C 339. 4. (1914) 27 M L J 605.
5. (1916) 30 M L J 611 at 613. 6. (1918) 3 Pat L J 645.

Akshia-Pillai v. Govindarajulu Chetti.

if as alleged in para. 6 of their affidavit in M. P. No. 453 of 1920 the plaintiff and the 7th defendant got an order that the 3rd lot was to be sold last, without bringing the order on M. P. No. 230 of 1917 to the notice of the Court, nevertheless as shown in para. 7, the respondents heard of the fraud and brought the order to the Court's notice. The Court then considered the whole question with everything before it and ordered on 11th August, 1920, that the 3rd and not the 2nd lot should be sold last—Order on M. P. No. 402 of 1920. This was the order followed at the sale. (Para. 8 of the affidavit and sale list.) Therefore there was no violation of a final order as the learned District Judge was led to suppose.

In the circumstances these appeals are allowed with costs throughout. Vakils' fees one set. The order of the District Munsif on C. M. P. No. 453 of 1920, dated 30th October, 1920 is restored.

T. S. V *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Muppavarapu Venkata Radhakrishna Rao and another *Appellants* (Defendants)*

v.

Venthurumilli Venkata Rao and others *Respondents (Plaintiff and his successors.)*

Radhakrishna Rao v. Venkata Rao.

Remand—Order of—Appeal from—Order under O. 41, R. 23—Order under inherent power of Court—Distinction.

An order of remand, which is passed, not under O. 41, R. 23, but under the inherent power of the Court, is not appealable.

In a case in which the first Court heard and decided the case before it fully on all issues the appellate Court permitted the plaint to be amended before it and remanded the case for trial on the amended plaint to the first Court. *Held*, that the order of remand was not one passed under O. 41, R. 23.

Appeal against the order of the Court of the Subordinate Judge of Masulipatam in A. S. No. 141 of 1921 preferred

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*A. A. O. No. 382 of 1922. 29th July, 1924.

Radha-krishna Rao v. Venkata Rao.

against the decree of the Court of the Principal District Munsif of Gudivada in O. S. No. 177 of 1919.

V. Ramadoss for appellants.

K. Rajah Aiyar for respondents.

The Court delivered the following

JUDGMENT :—Mr. Rajah Aiyar for respondents raises a preliminary point that no appeal lies.

The first Court heard and decided the case before it fully on all issues. The lower Appellate Court permitted the plaint to be amended before it and remanded the case for trial on the amended plaint to the first Court. This order of remand clearly cannot be brought within O. 41, R. 23, Civil Procedure Code, even in its widest interpretation as laid down by the Full Bench in *Raman Nayar* v. *Krishnan Nambudripad* (1). Nevertheless the only course open to an Appellate Court which permits before it an amendment of the plaint is to remand the case for trial to the first Court (vide *Uzir Ali Sardar* v. *Savai Behara* (2) and *Narottam Raja Ram* v. *Mohan Lal Khan Das* (3). Here then we are confronted with a legal order of remand which does not come within the purview of O. 41, R. 23, and cannot therefore subscribe to the contention of the appellant that such an order is unjustified in law. Now it is only orders of remand passed under O. 41, R. 23, which are subject to appeal. The present order which is not passed under that section, but under the inherent power of the Court, *see* S. 151, is not appealable. Our view is supported by a Bench of this Court in the case reported in *Athappa Chetty* v. *Ramanatham Chetty* (4). Our attention has been called by the appellant to the decision in *Malayandi Goundan* v. *Bomman Poosari* (5), but we do not consider that case lays down more than this, that the inherent power of the Court to remand, if existent at all, should not be exercised in any case in which another procedure, more definitely laid down by the Code, may be followed. Appellant has also relied on certain observations by the referring Judges in *Raman Nayar* v *Krishnan Nambudripad* (1), but in the judgment in that case, all the Judges were careful to restrict their judgment to the application of O. 41,

1. (1922) I L R 45 M 900 : 43 M L J 354 (F B). 2. (1916) I L R 43 C 938.
3. (1912) I L R 37 B 289. 4. (1919) 37 M L J 536.
5. (1922) 17 L W 159.

Radhakrishna Rao v. Venkata Rao.

R. 23, to the case before them, to which they all agreed it applied. That case does not therefore help the appellant. The case of the Lahore High Court quoted in *Mahmud Shah v. Talab Hussain Shah* (6) is exactly in point and we agree with the views therein expressed.

The appeal is, therefore, incompetent and is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE DEVADOSS.

Ottapurakkal Thazhath Soopi *Appellant* (2nd deft.)*

v.

Koochalantavida Parkum Chakkan Abdulla and others *Respondents (Plaintiffs 1 and 3 to 10 and defendants 1 and 3 to 5).*

Thazhath Soopi v. Abdulla.

Partnership—Malabar tavazhi—Karnavan of—Partnership trade by, with third parties—Other members of tavazhi—Rights of, so long as partnership is a going concern—Rights on dissolution—Surrender of interests of tavazhi by Karnavan under dissolution arrangement—Validity against other members—Suit by them for recovery of their rightful share in partnership—Maintainability.

When tavazhi property is invested in a trade carried on by the Karnavan of the tavazhi in partnership with a third party, each member of the tavazhi does not thereby himself become a partner. In such a case the manager of the family is the trading partner and represents the interests of the joint family, and the other members of the tavazhi have no right to interfere in the management of the affairs of the partnership so long as it is a going concern.

When, however, the partnership is dissolved, and by the agreement of dissolution the Karnavan surrenders the interests of the tavazhi to the third party without any consideration, his act amounts to an alienation of tavazhi property, and, as he was in a fiduciary position, the other members of the tavazhi are entitled to follow the tavazhi property into the hands of those in whose favour it has been alienated.

The 1st defendant, who was the Karnavan of a tavazhi consisting of himself and the plaintiffs and others, entered into a partnership agreement with the 2nd defendant and one *A*, whereby each of the partners was to have a 1|3 share in the profits of the trade. Eventually the partnership was dissolved

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*Appeal No. 310 of 1921. 21st March, 1924.

6. (1923) 73 I C 915: (A I R) 1924 Lah 245.

by an agreement under which the 2nd defendant was given a half share instead of a 1|3, and the 1st defendant and *A* took each a 1|4. The surrender by the 1st defendant of the extra share to the 2nd defendant was without any consideration and was not consented to by the adult members of the 1st defendant's tavazhi.

Thazhath Soopi *v.* Abdulla.

In a suit by the plaintiffs for a declaration that the dissolution arrangement was not binding on the members of the tavazhi and for the recovery of their rightful share, *held,* that the suit was maintainable notwithstanding that the plaintiffs were not members of the partnership and that the arrangement was not binding on the tavazhi.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry, dated 31st March, 1921, in O. S. No. 21 of 1917.

C. V Anantakrishna Aiyar and *T. S. Viswanatha Aiyar* for appellant.

A. Krishnaswami Aiyar, P. S. Narayanaswami Aiyar and *P. S. Ramachandra Aiyar* for respondents.

The Judgment of the Court was delivered by

Spencer, J.

SPENCER, J. :—The parties are Moplahs governed by the Marumakkathayam Law. The 2nd defendant appeals. The 2nd defendant and one Alipi Haji, now dead, were carrying on a timber trade. In 1896, the 2nd defendant took his son, the 1st defendant, as a partner and a partnership agreement was drawn up, which is Ex. A, dated 9th February, 1896. Under this, each of the partners had a 1|3 share in the profits of the timber trade. The assets contributed by the 1st defendant were the *putravakasam* property of the tavazhi, consisting of himself and the plaintiff, the 5th defendant and her children (plaintiffs 5 to 9) and the wife of the 2nd defendant. The tavazhi property was thus invested in the partnership trade, 1st defendant being the Karnavan of the tavazhi. In such a case, each member of the tavazhi does not himself become a partner, but as held in *Ramanathan Chetti v. Yegappa Chetti* (1) and *Gangayya v. Venkataramayyah* (2) the manager of the family is the trading partner and represents the interests of the joint family. That being the case, the members of the tavazhi would have no right to interfere in the management of the affairs of the partnership so long as it was a going concern. But in 1913 the partners entered into an agreement (Exhibit C) to dissolve the partnership and to have a partition

1. (1915) 30 M L J 241. 2. (1917) I L R 41 M 454 34 M L J 271.

Thazhath Soopi v. Abdulla.

Spencer, J.

deed drawn up. They also made a temporary arrangement for the allotment of the elephants which were used in the working of the timber trade. The dissolution of partnership agreed to at that time was finally embodied in Ex. I, dated 22nd November, 1914, under which the 2nd defendant was given a half share instead of 1|3 on account of his extra exertion and his supply of funds. Alipi Haji agreed to take one quarter and the 1st defendant also took one quarter. This suit was instituted to declare that that arrangement is not binding on the members of the tavazhi and to recover their rightful share.

It is obvious that the 1st defendant as Karnavan had no right to surrender the interests of the tavazhi without any consideration as this amounts to an alienation of tavazhi property, and as he was in a fiduciary position, the plaintiffs representing the tavazhi are entitled to follow the tavazhi property into the hands of those in whose favour it has been alienated. The objection that this suit will not lie on the ground that the plaintiffs are not members of the partnership and have no voice in the direction of the partnership affairs is answered by showing that at the time when the suit was instituted there had been a dissolution of partnership. In *Watts* v. *Driscoll* (3) it was held by the Court of Appeal that the assignor of a share in a partnership is not bound by any agreement made by the partners themselves on a dissolution of partnership by which the amount or value of the share is altered. In the English Partnership Act of 1890, S. 31 makes it clear that an assignee cannot interfere in the management of the affairs of the partnership, but upon dissolution he is entitled to take his assignor's share of the assets and to have an account from the date of the dissolution. The same principle was followed in *Chidambaram Chetti* v. *Karuthan Chetti* (4). That was a case of sub-partners and the learned Chief Justice observed that in the absence of any settlement between the partners before dissolution, which of course would be binding on the sub-partner, the sub-partner after the dissolution is entitled to have an account taken to ascertain the share of the partners under whom he claims, as without such an account it would be impossible to say what he was entitled to. The objection to the maintainability of the suit thus fails.

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3. (1901) 1 Ch 294.

4. (1919) 39 M L J 511 at 514.

Thazhath Soopi v. Abdulla.

Spencer, J.

On the merits it is urged for the appellant that the lower Court should have found on the evidence that there was a settlement by arbitrators by which the 1st defendant's and Alipi Haji's shares were reduced after looking into the accounts and the 2nd defendant's share was increased. The Subordinate Judge has held that the alleged mediation was a fiction. We have referred to the evidence of the defence witnesses. They do not say that in consideration of the extra contribution made by some persons definite sums were allocated to those partners who had contributed most, but they say that, before the net assets of the partnership were ascertained, there was an agreement that 2nd defendant should take half of the whole assets and that the other partners should take each a moiety of the remainder, as the arbitrators thought it was proper to do so. Unless the adult members of the tavazhi consented to such an arrangement, they would not be bound by the 1st defendant's action against their interests. The witnesses do not speak of any such consent being given by the other members of the tavazhi. D. W. 1 and D. W. 3 say that the 1st plaintiff was present at the mediation. Nanu Menon, the 5th witness, who is supposed to have settled it, says that the 1st plaintiff was present but he was not consulted and he did not raise any objection. The 1st plaintiff has stated that he did not know about any mediation by Nanu Menon, and he was not cross-examined as to whether he was present on that occasion. D. Ws. 2 and 3 say that they did not see Nanu Menon that day.

It has not been shown that there was any occasion for arbitration on account of any disputes between the partners. The 2nd defendant has not gone into the witness box and given his account of what happened.

On the whole, we see no reason to differ from the Subordinate Judge's conclusion that there was no regular arbitration in the matter. The lower Court's judgment awarding plaintiffs 1 and 3 to 10 on behalf of themselves and defendants 1 and 5 1|6th of the properties given to the 2nd defendant is therefore correct. The decree provides that the 2nd defendant do deliver up 1|6th of the properties given to him as shown in Schedules A and E, and if it is not available, to pay their value Rs. 27,502. There is no question of the immoveable properties being available or not available.

Thazhath Soopi v. Abdulla, Spencer, J.

The Memorandum of Objections raises the question whether 1|6th of the properties should not have been partitioned and delivered. The decree will be amended by directing that the 2nd defendant do deliver up 1|6th of the immoveable properties and 1|6th of the moveables and providing that if any moveables are not available to be delivered, 1|6th of their value as found by the Commissioner shall be paid by the 2nd defendant, or as ascertained in execution if the Commissioner has not already valued any particular item. With this modification, the Appeal is dismissed with costs.

The division of both immoveable and moveable properties may be made in execution.

Upon the Memorandum of Objections, the respondents will recover Rs. 265, the difference between the amount of Court-fee which the appellants actually paid and the amount they ought to have paid. Vakil's fees to be calculated on the correct amount at which the suit ought to have been valued, namely Rs. 55,000.

A. S. V. *Decree varied*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KUMARASWAMI SASTRI.

Bollapragada Subbarayudu and others *Appellants** (*Defendants* 4 *to* 8 *and* 21 *to* 34 *and* 19)

v.

Valluri Narasimha Rao *Respondent.*

Subbarayudu v. Narasimha Rao.

Landlord and tenant—Ejectment—Service inam—Resumption—Right to eject—Assessment of full rent.

In a suit by a Zamindar for ejectment of a tenant on resumption of a service inam the plaintiff must prove his right to eject. In order to prove a right to eject he must necessarily show that the tenancy is a terminable one and has been validly terminated. This onus is unaffected by any defence of permanent rights of occupancy which the defendant may set up but fail to prove. Even though the plaintiff is not entitled to a decree for possession he can impose full rates of rent on the land. *Muthuswami Aiyar* v. *Nainar Ammal,* 7 L W 194 ; *Venkatarangayya Appa Row Bahadur* v. *Marampudi Bajiraju,* 45 M L J 238 relied on.

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*Appeal No. 129 of 1921. 13th February, 1924.

Subbarayudu v. Narasimha Rao.

Appeal against the decree of the Court of the Additional Subordinate Judge at Ellore in O. S. No. 15 of 1920 (O. S. No. 128 of 1919 on the file of the Court of the Subordinate Judge of Ellore).

A. Krishnaswami Aiyar for appellants.

V. Ramadoss for respondent.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—This suit was brought by the purchaser of the proprietary interest in Pedamamidipalli, a whole village in Elamanchili Zamindari Estate, to eject the defendants who are tenants holding plaint items 1 to 16 which were once part of a darimilla inam, or failing the relief of ejectment, to declare the plaintiff's right to impose full rates of rent on the lands, and to give the plaintiff a decree for recovery of rent at nine bags of grain per acre for three years. The suit lands were granted about 1819 to the defendants' ancestors for rendering karnam service. In 1910, Government purported to enfranchise these lands and the plaintiff filed a suit, O. S. No. 16 of 1911, for setting aside the enfranchisement and for a declaration that the right of resumption rested with him and not with Government. In this suit he was finally successful in the High Court. The present suit is for ejectment of the defendants. The lower Court gave the plaintiff a decree for possession with mesne profits. Defendants 4 to 8, 21 to 34 and 19 appeal.

The facts of this case resemble those of *Idubilly Siyyaddi v. Sri Rajah Viswaswara Nissanka* (1) with this difference, that there was an admission in that case that prior to the inam grant, the lands were ordinary jeroyati lands, whereas here the question whether the original grant was a grant of land to be held on a favourable rate of rent or a grant of a part of the melvaram, or landlord's share, depends upon the evidence. Beyond the oral evidence of one witness on each side, which is inconclusive, the evidence is entirely documentary. Each side has attempted to draw an inference in their favour from certain ancient documents called yadasts, ghoshparas and bubands marked as Exs. C series. Ex. C-3 is the yadast for fasli 1229 corresponding to the year 1819. This shows an increase of

1. (1915) 18 M L T 142.

Subbarayudu v. Narasimha Rao.

Spencer, J.

four putties in the total cultivated area of the village. It also shows for the first time the existence of 1 1/2 putties of service inam. For the appellant, Mr. Krishnaswami Aiyar argued that a smaller standard of measurement must have been adopted in measuring the lands for this year, and in proof of this theory, he pointed to the excess in the area of village sites, lakes, channels, etc., which are items not likely to be liable to sudden increases. On the other hand, the respondent relies on this document to show that the service inams must have been granted out of land that had been previously lying waste. It is difficult to say which is the right assumption to be made. On the other hand Ex. C-1, the account of cultivation in fasli 1210, shows that the family of Bollapragada Kondraju, who was the defendants' ancestor, possessed two putties of jeroyati land in addition to one-fourth dumbala inam. The Subordinate Judge is in error in his observation that these accounts do not show that Kondraju was cultivating any land in Pedamamidipalli as jeroyati land before the grant.

In this state of the evidence, it is argued for the respondent that recent decisions of the Privy Council and of this Court have unsettled the principles upon which *Idubilly Siyyaddi* v. *Sri Rajah Viswaswara Nissanka* (1) and *Gajapathi Maharaju Garu* v. *Sondi Prahlada Bissoyi Ratno* (2) were decided and that now the burden is on the tenant to show that he was granted a right of kudivaram when the inam grant was first made. The most recent decision of the Privy Council is that in P. C. Appeal No. 46 of 1922 in which they say that "it cannot now be doubted that when a tenant of lands in India sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant." In *Suryanarayana* v. *Patanna* (3) the Privy Council laid down that there was no presumption that at the date of the grant of an inam, there were any tenants holding lands with any rights of occupancy by custom or otherwise. It is also true that no permanent right of occupancy arising out of the enactment of S. 6 of the Madras Estates Land Act, Act I of 1908, in favour of holders of ryoti land in an estate can be availed of by holders of service inams, as such lands are expressly excluded by S. 3 (16) (*c*) from the definition of ryoti land so

1. (1915) 18 M L T 142. 2. (1913) 14 M L T 562.
3. (1918) I L R 41 M 1012 36 M L J 585 (P C).

Subbarayudu v. Narasimha Rao.

Spencer, J.

long as the service tenure subsists. Upon resumption of a service inam, if the land is incorporated among the ryoti lands, the person let into possession would acquire an occupancy right by virtue of S. 6. But in the present case with the exception of items 7 and 8, for which the plaintiff says that jeroyati pattas were issued by mistake, there is no admission on the part of the landlord that the lands became " ryoti " lands when they were dis-annexed from the burden of service. It has, however, been made clear not only in *Idubilly Siyyaddi* v. *Sri Rajah Viswaswara Nissanka* (1) but also in *Muthuswami Aiyar* v. *Nainar Ammal* (4), that when a plaintiff seeks to eject a defendant from possession on the ground that the latter is his tenant whose tenancy has been terminated, he must prove not only that the defendant is his tenant as alleged, if that is denied, but also his right to eject. In order to prove a right to eject, he must necessarily show that the tenancy is a terminable one and has been validly terminated. This onus is unaffected by any defence of permanent rights of occupancy that the defendant may set up but fails to prove. The principle that in a suit for ejectment the plaintiff must first prove his right to eject before the onus is shifted to the defendant to prove that he has a permanent right of occupancy has been recently re-affirmed in *Venkatarangayya Appa Rao Bahadur* v. *Marampudi Bajiraju* (5) which was like this a case of a resumption of a service inam.

Mr. Ramadoss argued that in the previous suit it was admitted that the land was granted as inam. The suit was between the Zamindar and the Government as to the latter's right to enfranchise and the ryot was only a *pro forma* defendant. As observed in *Gunnaiyan* v. *Kamakchi Aiyar* (6) the practice of Government upon enfranchisement is to impose full assessment and not to disturb existing possession. Therefore the use of the word " land " in the written statement of the tenant in this suit is inconclusive. In the present case the plaintiff having come into Court with a prayer to be put in possession of lands in defendants' occupation has failed to prove that the defendants are holding those lands upon a tenancy which is terminable and has been determined.

1. (1915) 18 M L T 142.
4. (1917) 7 L W 194.
5. (1923) 45 M L J 238.
6. (1902) I L R 26 M 339 at 346.

Subbarayudu
v.
Narasimha
Rao.

Spencer, J.

The Lower Court was therefore not justified in giving the plaintiff a decree for the first relief asked by him, and the lower Court's decree directing delivery of possession of items 1 to 16 must therefore be modified. In lieu thereof the plaintiff will have a decree for recovery of the full assessment of the land at the rates to be determined under the seventh issue which the lower Court has left undecided. The appeal is therefore allowed and the suit will be remanded for deciding the seventh issue and giving the plaintiff a decree for rent in accordance with the decision upon the other issues in the case. Costs in this Court to be borne by the respondent. Costs in the lower Court will abide and be provided in the final decree.

Kumaraswami Sastri, J. :—I agree.

A. V. V. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT :—LORD SHAW, LORD BLANESBURGH, MR. AMEER ALI, SIR LAWRENCE JENKINS AND LORD SALVESEN.

Seth Hukum Chand and others *Appellants**

v.

Raja Ran Bahadur Singh and another *Respondents.*

P. C.

Seth Hukum
Chand
v.
Raja Ran
Bahadur
Singh.

Disqualified proprietor—Estate under management of manager appointed under Chota Nagpur Encumbered Estates Act, 1876—Dealing with estate—Person having right of—Manager—Position, powers and duties of, under Act—Agreement regarding estate under management of Manager—Manager not party to—Specific performance of agreement—Suit for—Maintainability—Contract—Construction—Further contract—Execution of—Provision for condition precedent—If and when a— Non-fulfilment of condition—Enforceability of contract—Effect on.

The first respondent was owner of a hill. At all material dates, however, the management of his estate, including the said hill, was, under the Chota Nagpur Encumbered Estates Act, 1876, vested in a Manager appointed under the Act.

While the first respondent's estate was so under the management of the said Manager an agreement consisting of a series of letters was entered into between the appellants and the servants and officials of the Lieutenant-Governor of

*P C Appeal No. 103 of 1921. 18th March, 1924.

P. C.

Seth Hukum Chand v. Raja Ran Bahadur Singh.

Bengal for the grant to the appellants of a permanent lease of the said hill on certain stated terms. The Manager was not a party to the said agreement. The agreement, however, contained an express proviso that a short agreement embodying the terms agreed upon should be prepared and executed by (1) the Deputy Commissioner or such other officers, representing the Court of Wards as was authorised to sign such agreement, (2) the 1st respondent, and (3) the appellants.

The Manager of the Encumbered Estate declined to give his assent to carrying out of any transaction upon the lines indicated, whereupon the appellants sued the 1st respondent, by his representative and guardian for the suit the Manager under the Encumbered Estates Act, for specific performance of the agreement prefaced by a declaration that the same was binding upon the defendant.

Held, (1) while the estate was under the management of the Manager, he was, in the eye of the law, fully and completely vested in the management of the estate, the vesting in him continuing during the tenure of his office, and he was the one person who, by law, could be a contracting party with regard to the estate under his charge; (2) the person *in titulo dominii,* namely, the Manager, not being a party to the contract, specific performance of which was sought, specific performance of the contract was an impossibility in law; and (3) assuming that the alleged contract was entered into with a person entitled so to do, the proviso in the agreement constituted clearly a condition precedent to the enforceability of the contract, and as the Manager declined to execute the intended agreement, there was no enforceable contract at all.

Effect of vesting of property in a Manager under the Encumbered Estates Act.

Position, powers and duties of such Manager.

Provision for execution of further contract when a condition precedent and when a mere provision of a formal character and of a purely executory nature.

Appeal from a judgment and decree of the High Court of Judicature at Patna, dated 4th June, 1919, which affirmed a judgment and decree of the Additional Subordinate Judge of Hazaribagh, dated the 24th July, 1917.

18th March 1924. The Judgment of the Board was delivered by

Lord Shaw, J.

LORD SHAW :—This is an appeal from a judgment and decree of the High Court of Judicature at Patna, dated the 4th June, 1919, which affirmed a judgment and decree of the Additional Subordinate Judge of Hazaribagh, dated the 24th July, 1917.

The prayers contained in the suit are numerous, but the outstanding and substantial questions which were argued before the Board were two in number. The first was for a declaration that an agreement, dated the 30th November, 1908, "is binding

P. C.

Seth Hukum Chand v. Raja Ran Bahadur Singh.

Lord Shaw, J.

upon the defendant." The second is for specific performance of this agreement, and that possession be made over with the demised property to the plaintiffs and the sum of Rs. 50,000 as, and by way of, compensation of damages paid to the plaintiffs. Shortly stated, the suit is one for specific performance of an agreement prefaced by a declaration that that agreement is binding.

The question of who are the parties to the suit raises an important question in the case. The defendant is thus named :—

"Raja Ran Bahadur Singh, son of Raja Paresh Nath Singh, deceased, holder of the Palgunj Estate in Hazaribagh, by his representative and guardian for this suit Babu Krishna Chandra Ghosh, Manager of the said Palgunj Estate appointed under the Chota Nagpur Encumbered Estates Act (VI of 1876) and residing at Hazaribagh aforesaid."

Raja Ran Bahadur Singh was part owner of the sacred range of hills aftermentioned. But at all the material dates the management of his estate was, under the Chota Nagpur Encumbered Estates Act, 1876, and an order pursuant thereto pronounced on the 13th December, 1902, and duly published on the 28th January, 1903 vested in the Manager, Babu Krishna Chandra Ghosh. It was thereafter, and at the time of the lodging of the defence, vested in another Manager, Babu Janki Nath Gupta, who had been appointed Manager with effect from the 25th May, 1914, by order dated the 3rd and published on the 5th July, 1914.

This second Manager, as such, sold the right, title and interest of Ran Bahadur Singh and the Palgunj estate,—in other words, sold the Paresh Nath Hill,—to the compearing respondent, by sale deed dated the 9th March, 1918. This was the result of a compromise arrived at and approved by the Court as in the interests of both the Raja Bahadur Singh and another Raja, the Raja of Nowagarh, between whom another suit was thus arranged in the months of the preceding January and February.

These details are only here referred to, to explain the appearance of the second respondent. He represents the *Sitambari* community of Jains, and he, as representing such community, is purchaser of the hills as just mentioned. The present suit, however, the result of which, if favourable to the

P. C

Seth Hukum Chand v. Raja Ran Bahadur Singh.

Lord Shaw, J.

appellants, would upset the compromise and sale just enumerated, has reference to another and a prior agreement alleged to have been concluded at an anterior date.

The alleged agreement, specific performance of which is asked in this suit, is said to have been made during the *regime* of the first Manager, Mr. Chandra Ghosh, and though not, of course, made with the Raja, was (so it is contended) such an agreement as would bind him and his encumbered estate.

The Raja Ran Bahadur Singh himself, although a nominal respondent in the appeal, was not represented before the Board.

The agreement consists of a series of letters, the most important of which are dated 25th, 26th and 30th November, 1908 ; the last of these bears to be an acceptance of certain modified terms of agreement as set forth in the letter of the 26th November. It bears to be for a permanent lease of the whole hill which " will be granted to the *Digambar* Jains subject to the terms and conditions and reservations hereinafter contained so that the hill may be protected from everything repugnant or opposed to the feelings or religious tenets of the Jains. A premium is to be paid of Rs. 50,000, and an annual sum of Rs. 12,000 by way of rent." Various other provisions were made with reference to timber, minerals, village rights, etc. The remarkable feature of the transaction is that it is not a transaction with the person vested in the management of the property, namely the Manager, but is with the servants and officials of the Lieutenant-Governor of Bengal.

The facts have been stated in both the judgments of the Court below with much clearness and care. The following description of these sacred hills is taken from the judgment of the High Court :—

" The range of hills known as Paresh Nath Hill lies in the Hazaribagh District and runs roughly from East to West. It has a central range about a mile and a quarter long with outlying spurs a part of which is Government property. The greater part of the hill, however, is claimed as part of the Palgunj Zamindari. For many years this hill has been an object of adoration by the Jains who hold an *Ekrarnama* from the father of the present Raja of Palgunj agreeing to grant them such lands on the hill as they may need for the purpose of building temples. Indeed at one time they went so far as to claim the hill as their own under Sanads granted by Akbar and Ahmad Shah. These, however, were found by the Calcutta High Court to have been spurious

P. C.

Seth Hukum Chand v. Raja Ran Bahadur Singh.

Lord Shaw, J.

documents. A number of temples have in the past been erected along the crest of the central range and many pilgrims, resort there for worship and in the course of time the Jains have come to regard the locality as a sacred adjunct to the performance of their religious observances and keenly resent its use or occupation by others for purposes which are repugnant to their religious views and which they regard rightly or wrongly as an interference with their vested rights."

There were in the hills many interests, legal, customary and religious, which had to be considered. Some leaseholders had already vested interests therein The Sonthal tribes claimed a right of hunting wild animals over the whole range. The Zamindar of Nowagarh had a claim to the property of the southern slopes of the hill as part of his Zamindari. Certain rights had been granted by way of lease to a Mr. Boddam, under which the lessee had made tea-gardens and erected a piggery. As the taking of life was a violation of the religious feelings and beliefs of the Jains this establishment tended to be provocative of confusion and disorder.

In 1907, the Governor-General of India had approved of a scheme for opening a *sanatorium* and residential buildings for Europeans on the western spur of the central slopes of the range. The crest of the central range is dotted over with small temples, or *tonks*, which the Jains are allowed to enter and there to worship the "*charans*" or footprints of the saints in whose honour the *tonks* had been erected. Much had to be done by way of demarcation of boundaries as well as an adjustment of rights.

It was in these circumstances, after the Government approval of the erection of a *sanatorium*, that the hill was visited by the Lieutenant-Governor of Bengal, Sir Andrew Fraser. Following upon his visit there took place the correspondence which has been referred to, the governing object of which no doubt was to have the hill taken in lease by the Jains from those in right of it by law. The principal of these was the Raja already mentioned, the Zamindar of Palgunj. His estate, as stated, was under a Manager appointed by virtue of the Chota Nagpur Encumbered Estates Act.

It is important now to consider what are the position, legal status and rights of such a Manager in law. Under S. 2 of the Act VI of 1876, called "The Chota Nagpur Encumbered Estates Act, 1876," it is provided that when the holder of im-

P. C.
Seth Hukum Chand v. Raja Ran Bahadur Singh.
Lord Shaw, J.

moveable property is a minor or of unsound mind, or when his property has been attached in execution of a decree of a Civil Court, then, upon application, the Commissioner may, with the previous consent of the Lieutenant-Governor, " appoint an officer (hereinafter called the Manager) and vest in him the management of the whole or any portion of the property." S. 3 declares the effect of the order and is important. It provides in particular :—

"Thirdly, so long as such management continues :—

(*a*) the holder of the said immoveable property and his heir shall be incompetent to mortgage, charge, lease or alienate their immoveable property or any part thereof or to grant valid receipts for the rents and profits arising or accruing therefrom.

(*c*) the holder of the same property and his heir shall be incapable of entering into any contract which may involve them, or either of them, in pecuniary liability."

Elaborate provisions are made for the performance of the Managers' duties, including the recovery of all rents and profits, the disbursements therefrom and the settlement of duties. Under S. 10 an appeal is granted to the Deputy Commissioner, within whose jurisdiction the property is situated, against refusals, admissions or determinations of claims by the Manager, failing which appeal the Manager's determination is final. Under S. 12, if the debts and liabilities are paid and discharged, or an arrangement made for satisfaction accepted by the creditors and approved by the Commissioner, the holder or his heir, are to be reinvested in the property, or such part thereof, as has not been sold by the Manager under the power contained in S. 18, but subject to the leases and mortgages, if any, granted and made by the Manager under the powers hereinafter contained.

Under Ss. 13 to 18 the wide powers of the Manager are set forth. In particular under Ss. 17 and 18 powers to demise the property for a term of years or in perpetuity, powers of mortgaging and selling by auction, etc., are all given to him.

Up to this point it is clear that the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas, on the other hand, the Manager is vested and alone vested with such powers. The

P. C.

Seth Hukum Chand v. Raja Rao Bahadur Singh.

Lord Shaw, J

latter is, in short, in the eye of the law, fully and completely vested in the management of the estate, and the vesting in him continues during the tenure of his office.

Under S. 19, of which much was made by the appellants, power was given to the Lieutenant-Governor of Bengal to regulate a variety of matters by making rules which have expressly to be rules " consistent with this Act."

Under S. 20 it is provided :—

" Whenever the Commissioner thinks fit, he may appoint any officer to be a Manager in the stead of any Manager appointed under this Act ; and thereupon the property then vested under this Act in the former Manager shall become vested in the new Manager. Every such new Manager shall have the same powers as if he had been originally appointed. "

S. 21 may also be reckoned as relevant, namely :—

" Every Manager appointed under this Act shall be deemed a public servant within the meaning of the Indian Penal Code. "

In the opinion of the Board it is necessary to give very full and careful effect to the position of a Manager vested under the Act, in the management of the property of the nature already described. It is in their Lordships' opinion clear that the owner of such property is expressly disabled from making any effective contract with regard to it, and it is equally clear that no other officer, whether political or departmental, could occupy the place, or enjoy or exercise the rights, of the disposal of the estate, the management of which estate is vested in the Manager and the Manager alone.

It may well be that, as the Manager was in the list of public servants, his conduct as such servant may have been open to comment by those in higher official rank, and it may also be that a successor to him might be appointed ; but the moment such a successor was appointed the predecessor was divested and the successor invested with all the rights and title. Under the Encumbered Estates Act the Manager for the time being stands responsible in law for fidelity in the discharge of the entire duties of management, disposal, realisation and restoration, with regard to the estate under his care.

It is the further opinion of the Board that in the performance of such duties the Manager is neither the servant, nor the agent of another, be that other either a private intervener or a public or political or departmental officer. The Manager

P. C.

Seth Hukum Chand *v.* Raja Ran Bahadur Singh.

Lord Shaw, J.

is himself the principal under the statute, and he must conform in the discharge of his duties to the provisions of the Act.

It may well be that political and social considerations may induce a certain course of policy with regard to portions of property under a Manager's charge and that communications may accordingly be addressed to him, in so far for instance as they bear upon the safety of the property, or the possible injury or advantage to the rights committed to the Manager's charge. But the Manager must, with all his local knowledge, consider these problems for himself, and with regard to the acquisition or disposal of the estate or a permanent lease thereof, it is clear that the responsibility lies upon him as the principal in the transaction.

It must not be supposed that such considerations were absent from the mind of the Lieutenant-Governor in the course which he was anxiously pursuing for the appeasement of any trouble in the district. The contrary is the case, and in the letter of the 26th November, 1908, from the representatives of the *Digambari* Jains, the following express proviso was accordingly made :—

"We hereby accept the terms modified as above provided that a short agreement embodying these terms be prepared and executed by (1) the Deputy Commissioner or such other officers, representing the Court of Wards as is authorised to assign such agreement, (2) the Raja of Palgunj, and (3) ourselves as representing the *Digambari* Jains.

On this, three points have to be noted (1) In the negotiations reference is made to officers representing the Court of Wards. That, of course, is a mistake in terms ; but it is a recognition that the property is under management other than that of the owner and that a public official is in control of it.

(2) No agreement, embodying the terms, was ever prepared. Certain communications passed with solicitors, and a draft lease was attempted, but the negotiations with regard to that broke down.

(3) As to the provision that an agreement was to be prepared and executed by the three persons there named, none of them ever executed such an agreement, and in particular the Manager of the Encumbered Estate, not only never did so, but he declined to give his assent to carrying out of any transaction upon the lines indicated.

P. C.

Seth Hukum Chand v. Raja Ran Bahadur Singh.

Lord Shaw, J.

In view of what has been already said as to the position and rights of the Manager under the Encumbered Estates Act, it will be manifest that the letters founded upon as an agreement in respect of which specific performance should be asked, did not constitute any agreement with the one person who, by law, could be a contracting party with regard to the estate under his charge, and, therefore, that upon that ground neither he nor any one authorised by him, or entitled to act in his name, having entered into the alleged agreement, the ground of action for specific performance fails.

But their Lordships, out of respect for the High Court who have investigated the whole complex subject with much care, do not wish to indicate any dissent from the opinions of the learned Judges on the assumption that the above proviso would have been a condition precedent. They will assume for the moment that this alleged contract was entered into with a person entitled so to do. On that assumption they are of opinion, agreeing with that of the learned Judges, that the proviso did constitute quite clearly a condition precedent. To take the consent of the Manager and the adhibition of his authority by his signature to the transaction—to take that point alone, it seems beyond question that it was most natural and proper, and indeed necessary, that that agent should be personally satisfied, and after investigation, should personally approve of the merits of the transaction under which he was to dispose of a most important part of the real estate committed to his charge. It is further clear that in such circumstances it would be a misuse of language to describe his signing the contract and becoming bound as Manager and in that capacity *dominus* of the estate, as a mere provision of a formal character and of a purely executory nature. The Manager's consent, authority, and signature went to the root of the alleged bargain which had been come to. In a very full and strong sense the proviso cited was a condition precedent to the transaction.

The cases upon the subject are legion, and one citation very properly noted in the judgment of Mullick, J. may be here repeated, namely that made from the judgment of Lord Parker (as he afterwards was) in the case of *Von Hatzfeldt Wildenburg* v. *Alexander* (1) :—

1. L R (1912) 1 Ch. 284.

P. C.

Seth Hukum Chand v. Raja Ran Bahadur Singh.

Lord Shaw, J.

"It appears to be well settled by the authorities," says that learned Judge, "that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain; or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Their Lordships revert to the question only again to note, however, that the proviso is, in their opinion, much more than a condition precedent.

This is a negotiation carried on by a civil officer who is not the owner of the ground and who is not acting either as master or principal of the person who is the owner of the ground. Accordingly, specific performance of any contract so entered into is an impossibility in law because the owner of the ground and the person *in titulo dominii*, namely, the Manager, is no party to the contract which is asked to be specifically enforced. That is an end of the case in its legal aspect.

But their Lordships think it right to add that on a matter of fact they see no reason to differ from the judgment of the High Court where it is stated :—

"It must be borne in mind that the Manager in whom the estate was vested at the date of the agreement was Babu Krishna Chandra Ghosh; this gentleman was no party to the agreement and so far as the evidence goes there is nothing to show that he was even consulted during the negotiations and before the agreement was entered into."

Further, it is permissible to think that, if the Manager had been applied to, he would have made just such enquiries as were made later by the Settlement Officer, Mr. Reid, when he was asked to report upon difficulties which emerged with regard to carrying the projected policy forward. Mr. Reid narrates the conflict of opinion and otherwise between this Sitambari Society of the Jains and the Digambari Society. He refers to the litigation that has occurred, to the intrusions which have been made upon the hill, as already alluded to in this judgment, and to the conflict of title with regard to certain portions of it; and he concludes by stating in effect and quite frankly that he thinks the proposed lease is inadvisable and illegal. He then adds these observations :—

P. C.

Seth Hukum Chand v. Raja Ran Bahadur Singh.

Lord Shaw, J.

"The *Digambar* Society would proceed to erect new *tonks* some of them possibly adjacent to the already existing *tonks* which are managed by the *Sitambars*. The *Sitambars* would of course object, and would fall back on their rights, under the agreement of 1872. To enforce their legal rights, they would no doubt resort to violence, and very likely the site of every proposed new *tonk* would be the scene of a riot of greater or lesser magnitude. I understand that it is not the local authorities but the Local Government who proposed to sanctionn the lease of the hill to the *Digambari* Jains. In that case the latter authority would be put in the extremely invidious position of having sanctioned an agreement, the result of which must necessarily be rioting, possibly of a serious character. With this prospect in view, if there is any doubt of the legality of the proposed lease, it is evidently one which cannot be carried through."

This citation has only been made to indicate the serious responsibility that would have rested upon the Manager in becoming a party to such a transaction and the necessity for his personally acting with much circumspection. It is not for this Board to express any opinion whatsoever upon the conflicting points of policy or otherwise appearing in these discussions, but the futility of the attempt made on legal grounds in the present suit to have specific performance of the bargain not made with the Manager at all, is now obvious.

The judgments of the Courts below are accordingly affirmed.

There are two further points to which it may be necessary briefly to allude. The negotiations canvassed in this information took place during the *regime* of Manager No. 1, and in accordance with the opinion of the Board confirming that of the High Court no concluded agreement as the result thereof was ever arrived at. During the *regime* of Manager No. 2 a compromise was entered into of certain conflicting rights and this compromise was recorded and decree passed in accordance therewith on the 24th February, 1909. Accordingly, the attempted bargain in the first *regime* came to nothing : the compromise in the second *regime* resulted in a transfer of the hill to the respondent No. 2 and that bargain was duly confirmed by the Court.

"It must be taken that the compromise entered into with the Manager of the Palgunj Estate in Appeal No. 551 of 1914 and the conveyance made in pursuance thereof are binding on the Raja of Palgunj and his estate to the same extent as if the latter had been himself the contracting party."

P. C.

Seth Hukum Chand v. Raja Ran Bahadur Singh.

Lord Shaw, J

These are the words taken from the judgment of Mullick, J. and their Lordships are of opinion that it was an undoubtedly sound conclusion to be drawn as in these words:—

"There was, therefore, an implied obligation on the transferor not to derogate from the grant."

The Board is of opinion that the correct course was taken upon this point of the compromise of the suit and upon the attempt of the Raja of Palgunj to interpose on the subject.

The last question raised is as to what is to become of the Rs.50,000 which was transmitted in the form of a cheque for Rs. 50,000 on the Bank of Bengal by Pundit Mohan Krishna Dhar, dated the 3rd November, 1908, per a letter from him to the Private Secretary of the Lieutenant-Governor. The disposal of that remittance still stands upon the footing set out in the letter of the 6th September, 1910, by Mr. Gourlay, the officiating Secretary to the Government of Bengal, to Messrs. Morgan & Co. printed on page 15 of the Record. This letter concludes in the following terms :—

"I am, therefore, to request that you will be so good as to inform your clients that the arrangement proposed in November, 1908, has fallen through and that the Accountant-General, Bengal, has been asked to refund them with interest at 4 per cent. (the Bank rate of fixed deposits), the sum of Rs. 50,000 which they had paid as premium."

The right to ingather that sum still stands upon that letter and the money will no doubt be repaid upon demand by the proper authority accordingly.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitor for appellants : *I. Page Thomas.*

Solicitors for respondents *Ranken, Ford and Chester.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD DUNEDIN, LORD CARSON AND MR. AMEER ALI.

Nayak Vajesingji Joravarsingji and others *Appellants* *(Plaintiffs)*.

v.

The Secretary of State for India in Council *Respondent* *(Defendant)*.

P. C.
Nayak Vajesingji Joravarsingji *v.* Secretary of State for India.

Act of State—Cession of territory—Treaty between Scindia of Gwalior and the British Government of 12th December, 1860—Pattas granted in February, 1860, by Government of Scindia—Subsequent renewals thereof and proclamations by British Government—Recourse to Municipal Courts as to enforce rights arising under the Treaty of Cession—Plea of Act of State—When to be specifically raised—Onus of proof—Acts of acknowledgment of prior title by new Government—General statement in treaty that existing rights would be upheld—Meaning of.

The Naiks of the Talukas of Tanda, Katwada and Chandwana had under pattas from Scindia of Gwalior prior to 1860 no rights of absolute ownership but only as lease-holders or tenants ; and neither the treaty of cession between Scindia and the British Government, dated 12th December, 1860, nor the subsequent acts or proclamations of the British Government have conferred upon them any superior or better rights than they had before.

Upon a treaty of cession, an inhabitant of the ceded territory (*a*) can only make good in the Municipal Courts established by the new Sovereign such rights as that Sovereign has recognised, and not the rights enjoyed under the rule of his predecessors ; (*b*) is not entitled to approach the Municipal Courts for enforcement of rights which though stipulated for in the treaty, are only enforceable by the contracting powers. *Secretary of State* v. *Kamachee Boye Sahiba,* 7 Moo. I. A. 476, *Cook* v. *Sprigg,* (1899) A. C. 572 and *Secretary of State* v. *Bai Rajbai,* 42 I. A. 229 followed.

In a suit by plaintiffs for a declaration of rights which they allege they had prior to the cession of territory, a plea specifically using the words "Act of State" is not required. If there existed a right, either admitted or that could be established by decree of Court, and that right it was alleged was taken by an Act of State, it would be necessary to plead so specifically but not otherwise. The moment cession of territory is admitted the plaintiffs have the onus of proof cast on them of showing the acts of acknowledgment by the new Government which give them the right they wish to be declared.

A mere general statement in a treaty by which territory is transferred that existing rights would be upheld can never prevail against exact determination afterwards arrived at. Such a general statement must necessarily refer to only such rights as are on investigation determined by the Government officials.

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*P. C. Appeal No. 116 of 1922. 26th June, 1924.

Appeal against a judgment and three decrees (17th January, 1917) of the High Court of Judicature at Bombay, affirming a judgment and three decrees (24th February, 1913) of the Court of the District Judge at Ahmedabad.

The appeal arose out of three suits, Nos. 104, 105 and 106 of 1908, brought by the plaintiffs (appellants) in the Court of the District Judge at Ahmedabad on the 6th November, 1908 against the defendant (respondent) the Secretary of State for India in Council. Suit No. 104 was brought by the 1st plaintiff-appellant who is the Naik of the Tanda Taluka, Suit No. 105 by the 2nd plaintiff-appellant who is the Naik of the Katwada Taluka, and Suit No. 106 by the 3rd plaintiff-appellant who is the Naik of the Chandwana Taluka.

Each of the plaintiffs alleged in his plaint *inter alia* that he was a Talukdar and proprietor of his Taluka, that he had been in possession and enjoyment of his Taluka for over 200 years, that, during the time of the Government that preceded the Government of the Scindia, his ancestors had possession and enjoyment of his Taluka without any liability to make any periodical payment to the Superior Government, that during the time of the rule of the Scindia, the Government commenced to exact from his ancestors an annual payment called *Khandni* or *Jamma* ; that after the advent of the British, his ancestors were treated and recognised as proprietors of his Taluka in the same way as the other Talukdars in the Panch Mahals ; that, after the Panch Mahals were brought in 1885 under the Regulations, his name was included in the definition of *Talukdars* in the Bombay Act VI of 1888, that his estate was a Talukdari Estate ; and that he also had prescriptive title, acquired by him and his ancestors by long possession. He referred to the Government resolution of 1907 and contended that conditions Nos. 2, 5, 6, 7 and 8 of the proposed lease were inconsistent with his rights in his Taluka ; and he therefore prayed for declarations that he was not a lease-holder from the Government, that he did not hold his estate at the pleasure of the Government, but as a Talukdar and proprietor, that the Government was not competent to impose on him the conditions hereinbefore mentioned, or other conditions inconsistent with his rights ; and he also prayed that the defendant (the Government) might be restrained by injunction from taking any steps to remove him from the possession of

P. C.

Nayak Vajesingji Joravarsingji v. Secretary of State for India.

his Taluka, or any portion of it, and for further or other appropriate relief.

The defendant (the Government) by its written statement pleaded that none of the plaintiffs had ever been recognised by Government as a proprietor, that the Naiks had always had their Talukas under *Puttas* and had always been treated as lease-holders, that the conditions complained of were in no way novel and were perfectly in accordance with the plaintiffs' tenure, that the inclusion of the Naiks amongst the list of Talukdars in the Bombay Act VI of 1888 was intended only to give them the benefit of the provisions of the Act so long as they held any land, and did not in any way confer on them any proprietary rights, and that the plaintiffs were not entitled to continue to hold the plaint property otherwise than under the leases tendered to them, and in case of their refusal to accept such a lease, the Government was entitled to evict them.

The District Judge (B. C. Kennedy, Esq.) tried all the three suits together, and on the 24th February, 1913, he delivered judgment in favour of the Government. He held that the burden of proving that the plaintiffs were proprietors was on them, that the evidence was not conclusive as to whether the Naiks were proprietors or lease-holders, and that the plaintiffs having failed to discharge the onus cast on them, their suits must be dismissed with costs.

The plaintiffs appealed to the High Court of Judicature at Bombay, which (Sir Basil Scott, C. J. and Beaman, J.) on the 17th January, 1917, delivered judgment dismissing all the appeals with costs. The learned Judges held that, as to the question upon what terms the holders of the villages in question, successors of the holders in Scindia's time held under the British Government, such documents of title as the plaintiffs had received since the date of the cession of the Scindia to the British, all affirmed their position as Government lessees, and that the District Judge was right in throwing the burden upon the plaintiffs to show that they were proprietors, and in finding that the evidence was not conclusive as to whether they were proprietors or lease-holders and in dismissing their suits.

A. M. Dunne, K. C. and *J. M. Parikh* for appellants.

Sir George Lowndes, K. C. and *K. Brown* for respondent.

P. C.

Nayak Vajesingji Joravarsingji v. Secretary of State for India.

Lord Dunedin, J.

26th June, 1924. The Judgment of the Board was delivered by

LORD DUNEDIN :—In these consolidated appeals the three Naiks of Tanda, Chandwana and Katwada respectively, sue the Indian Government for a declaration that they are proprietors of the whole lands in the Talukas belonging to them and that they are not bound to accept a lease of the same in the terms offered to them by the Government in 1907. They admit that they are bound to pay a jamabundi or revenue contribution but contend that there the right of the Government of India ends. Their demand was refused by the District Judge and his judgment was confirmed on appeal by the High Court.

The lands in question are situated in the Panch Mahals and, previously to 1860, were in the domain of Scindia of Gwalior. On December 12th of that year Scindia ceded this territory to the British Government by a treaty of which Art. 3 is as follows :—

"The Maharaja transfers to the British Government in full Sovereignty the whole of His Highness' possession in the Panch Mahals and to the south of the river Narbada also Pargana Kumghar on the Betwa river on the following conditions :—

"1st. That for the lands transferred by His Highness, the British Government shall give in exchange lands of equal value calculated on both sides on the present gross revenue.

"3rd. That each Government shall respect the conditions of existing leases until their expiry, and that in order that this may be made clear to all concerned, each Government shall give to its new subjects leases for the same terms of years and on the same conditions as those which they at present enjoy.

"4th. That each Government shall give to its new subjects 'Sanads' in perpetuity for the rent-free lands—the Jageers, the perquisites and the hereditary claims (*i. e.,* 'Huks and Watans') which they enjoy at present under the other Government."

Their Lordships will have occasion presently to enquire into the circumstances of an earlier date, but, for the moment, they pause at this date because what happened in 1860 determines the law of the case. This law was most clearly laid down in the judgment of the Board delivered by Lord Atkinson in the case of *Secretary of State for India* v. *Bai Rajbai* (1). Their Lordships do not propose to repeat what was there said.

(1915) 42 I A 229 : 29 M L J 242 (P C).

P. C.

Nayak Vajesingji Joravarsingji v. Secretary of State for India.

Lord Dunedin, J.

It was no new law that Lord Atkinson laid down. The same had been held in the case of *Secretary of State for India* v. *Kamachee Boye Sahaba* (2), and *Cook* v. *Sprigg* (3). But a summary of the matter is this; when a territory is acquired by a Sovereign State for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the Municipal Courts established by the new Sovereign such rights as that Sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the Municipal Courts. The right to enforce remains only with the High Contracting Parties. This is made quite clear by Lord Atkinson at page 268, when, citing the Pongoland case of *Cook* v. *Sprigg* (3) he says "It was held that the annexation of territory made an Act of State and that any obligation assured under the treaty with the ceding State either to the Sovereign or the individuals is not one which Municipal Courts are authorised to enforce." Their Lordships have thought it necessary so far to repeat what has been said before because the appellants' counsel sought to make two points. He said that Act of State had not been pleaded before the Judge of first instance and ought not to be given effect to now. Their Lordships think that at least the appellants themselves recognised the true situation when, in paragraph 6 of the plaint, they say "after the advent of the British rule the ancestors of the plaintiff used to be treated as proprietors of the estates in the same way as the other Talukdars in the Panch Mahals." But in truth no plea specifically using the words "Act of State" is required. If there existed a right, either admitted or that could be established by decree of Court, and that right it was alleged was taken by an Act of State, it would be necessary so specifically to plead, but that is not the situation. The moment that cession is admitted the appellants necessarily become petitioners and have the onus cast on them of showing the acts of

2. (1859) 7 M I A 476.

3. (1889) A C 572.

P. C.

Nayak Vajesingji Joravarsingji v. Secretary of State for India.

Lord Dunedin, J.

acknowledgment, which give them the right they wish to be declared. The other point was that, in virtue of certain general declarations, the appellants became entitled to enforce the treaty. The general declarations will be subsequently examined. If they give a right of themselves well and good, but they can never have the effect of altering the law as above stated ; that is to say, of making the appellants, so to speak, a party to the treaty with a right to enforce the conditions of the same in a Municipal Court.

The whole object accordingly of enquiry is to see whether, after cession, the British Government has conferred or acknowledged as existing, the proprietary right which the appellants claim. The appellants first sought to prove that under Scindia they were proprietors. The defender retorted that they were merely farmers of revenue. Certain documents were produced out of the Gwalior repositories and controversy was raised as to whether they were genuine or had been tampered with. Their Lordships, for the reasons of law above stated, think it quite unnecessary to consider this question because their view of what was the tenure under Scindia has no bearing on the question. The view of the officials of the Government as to that would influence them to make up their minds as to what title should be given or recognised, but even then, as far as their Lordships are concerned, it is what they did after investigation, not what they thought at investigation, that is matter of moment.

The first touch between the Government of India and these people did indeed precede the cession. In 1850-51, owing to frontier troubles, it was thought expedient that a lease of all this territory should be granted to the company, who thereupon managed the territory, respecting the rights of the inhabitants as they found them. As a matter of fact the ancestors of the appellants at that time were the holders of pottas for an unexpired term, these pottas having been granted by Scindia and payments were under them made payable to the company. Their Lordships will at once, in order to show that they have not been swayed by any contrary contention, make the concession that the mere fact that the document of title held by the appellants is called a potta, and that they executed a Kabulyat in similar terms is not conclusive of the question of whether they were mere leaseholders, *i. e.*, farmers of revenue, or were

P. C.

Nayak Vajesingji Joravarsingji v. Secretary of State for India

Lord Dunedin, J.

true proprietors paying a jamabundi to the overlord. The term potta might quite appropriately be used for the instrument fixing such jamabundi. The term of the existing pottas expired in 1859, and in February 1860 Captain Buckle, who was in charge for the Government (who had by this time succeeded the company), granted, on the part of the Government of Scindia, three pottas to the appellants for a period of three years from 1860 to 1863. One of these pottas may be taken as a sample. The jamabundi for each year is fixed at Rs. 5,617-5-3. This was made up of Rs. 5,000 for the "jamabundi revenue," Rs. 217-2-5 for a balance and Rs. 600 a debt due to Jamadar Satarkhan. This last was an old debt due by the Naik which the Government was making him pay. Clause 2 provides for the Naik finding security from a banker, a proceeding unnecessary if the land could have been attached, but quite necessary if the lessee was not proprietor but merely a farmer of revenue. Then there is a clause binding the Naik at the termination of the potta to "hand over" the villages to the Government.

In 1860, in December, as already stated, came the cession. Immediately after the cession the Government set itself to enquire what were the estates transferred and what were the tenures of their new subjects. This was necessary, first of all, because as land of equal value elsewhere was to be ceded to Scindia, it was necessary to note the exact value of what had been taken over, and also because undoubtedly the Government wished to give effect to the terms of the treaty above quoted and in particular to the fourth head of the 3rd Clause. Accordingly Captain Buckle, who was in charge, was told to make enquiries and furnish exact lists, giving particulars of extant leases, also the names of all Jaghirdheers and their tenures and all charitable and rent-free holdings. Buckle made a report and in this report he enters the appellants as mere leaseholders and not as Jaghirdheers holding proprietary interests. No doubt this was, so to speak, behind the backs of the appellants but it is significant as being the foundation of the action which followed. The pottas which had been granted expired in 1863, consequently they had to be renewed. The Government officers proposed some increase of rent. In the meantime some outsiders made offers to take leases of the 3 Talukas for a rent preposterously higher than anything hither-

P. C.

Nayak Vajesingji Joravarsingji v. Secretary of State for India

Lord Dunedin, J.

to received. The Naiks had got wind of this and made representation to the Government in August, 1863. Their prayer is worded " As Government had been taking care of us they will be graciously pleased to grant us a potta to do which they are quite competent."

The Government came to the conclusion that they would not accept the outsiders' offer in view of the long time that the Naiks had had possession and renewed on the same terms. In 1868 the question came up again. There was a long enquiry by the Government as to the precise position of the Naiks. As an interim arrangement a lease was granted on the old terms to endure till the survey. This lease also provided for handing back the villages at the expiry of the period. The enquiry dragged on for some years, but in 1876 the Government came to a decision that the Naiks were not entitled to hereditary rights, but might be continued as leaseholders so long as they behaved themselves. This determination was conveyed to the Naiks by letter of 12th June, 1876, which contains the following passage :—

> " It appears that under the old rule the Pattas (leases) of these villages were also given several times to other people besides these Naiks, and from this it appears that their status may not be of hereditary Talukdars ; but for about the last fifty years the *vahivat* (management) has been smoothly carried on by the houses (families) of the three Naiks under their respective pattas and Meherban Propert Saheb and Major Voice Saheb have expressed their opinions that the management under the patta may continue with the Naiks so long as they properly take care of the villages. Hence this question is decided accordingly. The pattas of the three Talukas are to be continued till the survey takes place. The Survey Department has taken the trigonometrical survey of the three Talukas and it may be suitable to fix the amounts of the pattas, keeping in view the trigonometrical measurements at the time of the survey. No hereditary right of the Naiks is admitted in the preparation of the pattas."

In 1881, the survey having been introduced, the Government came to a resolution as to what leases should be granted. They were to be on a sliding scale calculated on the survey assessment and allowing the Naiks a 10 per cent. margin. This proposal must have been communicated to the Naiks, though there is no direct evidence to that effect, for in 1883 there is a petition from the Naiks complaining of the proposal as calculated to impoverish them ; complaining of the taking away of the forest land, and offering as evidence of right a document

P. C.

Nayak Vajesingji Joravarsingji v. Secretary of State for India.

Lord Dunedin, J.

granted in Scindia's time. This petition was refused in 1883 and the refusal communicated to the Naiks. In 1887 the question of the forest land arose in an acute form. The Naiks petitioned against the taking of the forest land by the Government. In the petition they really sought to re-open the whole question. Thus, in Art. 7 of the petition of 31st October, 1887, they say as follows :—

"7. If our right is considered by the Government as specially that of Ijardar mentioned above, it is a great mistake ; we have the right of ownership over our village, which is handed down from generations ; we had been recovering and we have been recovering the Jamabandi tax, Vaje (payment in kind), etc., from our villages in any manner we like. Also we gave (land) to others free from any tax ; we had been and have been giving as a loyal subject to the late and present Government a certain amount as Chauth in lieu of remaining under their protection."

This petition was considered, was not sanctioned, and a reply sent in the negative on 26th April, 1888. Under the Forestry Acts the Naiks could have appealed against this order, but did not do so.

In 1902 the Naiks again sought to raise the whole question by sending a memorial to the Government, in which they went over the whole ground again and claimed to have proprietary rights. This was sent to headquarters, when a report from the Under-Secretary, *inter alia,* said as follows :—

"4. The question as to the proprietary rights of these Naiks in their villages was fully inquired into and decided in the year 1880, and we are of opinion that no valid reason has now been shown for re-opening it after so long an interval of time. We are also of opinion that as the status of the memorialists is that of mere leaseholders, holding their leases at the pleasure of Government, their claims to the sole proprietary title in the forests within the limits of their villages cannot be admitted."

And the final determination of the Government was conveyed in a resolution of 13th December, 1902 :—

"The evidence collected by Mr. Beyts clearly showed that these Naiks never acquired the position of Talukdars, but that they were merely leaseholders, and in paragraph 1 of Government Resolution No. 2783, dated 31st May, 1880 (copy appended), the following orders were passed by this Government."

In 1904 there was a final report from the Government officials as to the leases, which, as already noticed, had not actually been granted. By this time there had been complaints of what the Naiks had been doing, and some of the officials were anxious that no new leases should be granted to the Naiks, but that the whole villages should be made kasla. The

P. C.

Nayak Vajesingji Joravarsingji v. Secretary of State for India.

Lord Dunedin, J.

Government, however, determined that the Naiks should have another chance, and the leases were offered, upon which they took the present proceedings.

It is abundantly clear from what has been above set forth that, although the Government officials took great pains to determine what was the position of the Naiks, they came to the conclusion that their rights were not those of hereditary proprietors. To say that is, in view of the law as laid down above, to say enough, but their Lordships will notice what has been urged on the other side. It is pointed out that the Naiks have been in the saddle for a long time. This is true, and it is to this fact that they held their position as leaseholders at all But for that long possession the villages would have been made kasla as others had been.

Then it is said that, by the terms of certain proclamations, the Government acknowledged the right. The proclamations in 1852, when there was merely a transference for administration purposes, are neither here nor there. When we come to the cession the proclamation referred to is in these terms :—

"I wish to let you know in time that the laws of the British Empire will be in force from the 1st of May next in the Panch Mahals.

"2. It has hitherto been the practice to reserve civil suits against the lands or houses for arbitration.

3. That can no longer be the case ; a suit once filed cannot be withdrawn unless by the consent of the complainant and the law will be enforced.

4. As a friend of all your ancient houses I wish to warn you beforehand against debt. If you wish to preserve your present position you should avoid it as the most unfortunate thing which can happen to you."

Then follows a list of names, among which are persons who have had acknowledged to them a real proprietary right, and in this list occurs the names of Katwada, Chandwana and Tanda. There is also, especially in the Naiks' petition, reference made to proclamations made at the time of the Durbar. There are two answers to be made to an argument founded on such documents. The first is that a mere general statement that existing rights would be upheld could never prevail against exact determinations such as have been above set forth. The second is that any statement in general terms that rights will be respected must necessarily mean as these rights are on investigation determined by the Government officials. To suppose that by such general statements in a proclamation the Government renounced their right to acknowledge what they

P. C.

Nayak Vajesingji Joravarsingji *v.* Secretary of State for India.

Lord Dunedin, J.

thought right and conferred on a Municipal Court the right to adjudicate as upon rights which existed before cession, is, in their Lordships' opinion, to misapprehend the law as above set forth. It was also urged that the Government had recognised certain free grants which had been made in the past by the Naiks. This is true. But the Government had directed a special head of inquiry to be made as to free grants. The wish not to disturb persons whose tenure had been, *de facto*, free was a generous policy. But to infer from this generosity that the Government was admitting that the grants had originally been properly made and that from that admission flowed the further admission that the Naiks were true proprietors is to make a mere inference over-ride a direct statement. One other matter may be noticed. The Naiks' susceptibilities seem to have been aroused by the term "Ijardars" being used as to them, and requested that the term "Talukdars" should be used. The Government's reply is as follows :—

"In reply to his petition, dated 26th September, 1898, to the address of Government, Naik Ratansing Pratapsing of Tanda in the Dohad Taluka of the Panch Mahals District, is informed that Government have no objection to his being addressed as 'Talukdar' instead of a 'Pattadar' in official communications, but it should be distinctly understood that this concession will not in any way affect the orders passed by Government in May, 1880, regarding the tenure of the petitioner's holding."

Now, the resolution of 1880 referred to was the foundation of the proposals as to the 10 per cent. margin, which, denying the proprietary rights of the Naiks, was objected to by the petition which was refused in 1883.

For these reasons their Lordships are satisfied that this appeal must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Their Lordships feel bound to call attention to the state of the record. In the teeth of directions issued from the office no trouble whatsoever had been taken with the arrangement of the record, and it came before their Lordships in quite a disgraceful state of confusion. Had the appellants been successful their Lordships would not have hesitated to disallow *in toto* the solicitors' fee for perusing the record.

Solicitors for appellants *T. L. Wilson and Co.*

Solicitor for respondent *Solicitor to the India Office.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT :—LORD SHAW, LORD BLANESBURGH AND MR. AMEER ALI.

Ashrafi Singh ... *Appellant** (*Plaintiff*)

v.

Bidya Prasad Narayan Singh and others ... *Respondents* (*Defendants*).

P. C.
Ashrafi Singh
v.
Narayan Singh.

Deed—Construction—Deed of gift by Hindu husband to his wife—Donee's estate—Description of donee as malik—Istamrari mokarrari *lease granted by donee.*

A deed of gift must be construed as a whole.

Where a Hindu husband in a deed of gift to his wife described her as *malik* but limited her powers of alienation and disposition of the property in certain specified ways, *held,* affirming the judgment of the High Court that (1) the clause in the deed containing the substantive disposition was subject to certain enumerated conditions and conferred upon the wife an ordinary Hindu woman's estate with powers to sell or to appoint by deed or will to certain specified persons, and if she did not exercise such powers, they were exercised in favour of these persons by the donor ; (2) the absence of provisions restricting the wife from granting a *mokarrari* lease did not by implication confer power to do so.

Appeal from a judgment and decree of the High Court (16th January, 1922) affirming a decree of the District Judge of Muzaffarpur (25th August, 1919), which dismissed a suit (No. 178 of 1911) brought by the appellant on the 20th May, 1911, in the Court of the Subordinate Judge of Muzaffarpur, and which he had decreed (11th February, 1919).

In that suit, the appellant, claiming to be the *istamrari mokarraridar* of certain properties under an *istamrari mokarrari* patta at a rent of Rs. 1,500 per annum executed on the 7th August, 1896, in his favour by one Musammat Mulukrani Kuar (who died in March, 1908) widow of Har Parkash Narayan Singh, late proprietor thereof, prayed for a declaration of her title thereunder. Several defendants were joined, including the present respondents (3rd and 4th defendants, minors under the Court of Wards), who alone contested the suit and claimed title to the estate, alleging that the Musammat had only a life-interest, in virtue of a deed of gift from her husband, dated 23rd June, 1859, which was as follows :—

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*P C Appeal No. 114 of 1923. 9th May, 1924.

P. C.

Ashrafi Singh v. Narayan Singh.

"I am Babu Har Parkash Narayan Singh, son of Babu Ram Narayan Singh, grandson of Chaudhry Kewal Kishen, resident and part-proprietor of Mauza Basowl, etc., in Parganah Bhala, etc.

"Of my own free-will and accord I, the executant, have made in favour of my wife Musammat Mulukrani Kuar, a gift of the whole and entire shares in the Mauzas owned and possessed by me up to this time without the participation and encroachment on the part of any individual, together with boundary limits, all adventitious and inherent right in lands and foundations, water-courses, reservoirs, *ahars, pokhars,* fisheries, forest rights, toddy and date palms, orchards of mango and jack-fruit trees, bamboo clumps, *sair,* salt *sair,* occupied and non-occupied houses, *and all rights appertaining thereto with the following conditions* :—

"1. The said Musammat, as proprietor, shall enter upon possession and occupation of the shares in Mauzas conveyed to her by gift, pay the Government revenue and shall get her name recorded in the Government Office.

"2. The following are the circumstances and conditions under which the said Musammat shall or shall not be competent to make a transfer of the gift properties :—If the said Musammat wishes, during my life-time, to transfer the gift properties for *Kar Khair* (charitable purposes) or if she desires to give them away to any of my heirs, *i. e.,* to a son born of her womb who may then be in existence or born afterwards (after my death) or to any one of my male or female descendants not born of her womb or to any other persons she will be at liberty to do so with my consent and approval. After my death, she will be competent to make a transfer of land measuring up to 50 *bighas* for charitable purposes. Similarly, she will also be competent to transfer by sale deed or gift, properties to a son born of her womb or to that son's son, or to my any other male or female descendant not born of her womb or to the male issues or issue of such children or to a male issue of my elder brother Babu Raghunandan Singh, whom she chooses. But she will have no power to effect a transfer by sale, gift or mortgage of land exceeding that quantity for which permission has been given (as referred to above) in favour of any other person than those named above, for charitable purposes.

"3. That if the said Musammat executes a will bequeathing the gift properties to one or the several persons named above, such person or persons will be entitled to the same on her death.

"4. If the said Musammat does not give the whole or portion of the gift properties of which she might be in possession until her death, to any one of the persons named above, or does not execute a will, then the sons born of her womb will be entitled to the same. If she leaves no son surviving, the male issue of the sons born of her womb will be entitled thereto. If some of the sons born of her womb be surviving and other dead and male issues of her (deceased) sons be living, then the surviving male issues of the sons born of her womb who have predeceased her will be entitled to the shares left by their father, along with their uncle, *i. e.,* the (surviving) son born of the womb of the said Musammat. If no sons born of the womb of the said Musammat and their sons be surviving, then the properties will go to my other sons not born of the womb of the said Musammat and to their sons. If there be surviving no male issue of me the executant, either born of the womb of the said Musam-

mat or otherwise, then my brother, Babu Raghunandan Singh, and on the latter's death, his sons, will be entitled to the same. But no female issue of the said Musammat or any one of her father's or mother's side will be entitled to claim heritage with regard to the gift properties.

"5. If there be no son born of the womb of the said Musammat or any descendants of the son born of her womb surviving, and if there be any unmarried daughter born of her womb or a daughter of the issue born of her womb and if any other son of me the executant or his male descendants or my brother Babu Raghunandan Singh or his male descendants do not perform the marriage of the said daughter in accordance with the custom of the family, then the said daughter and after her, in the first place, her male descendants and in the absence of her having male descendants, her female descendants shall be entitled to the same.

"6. The condition regarding succession to the estate of the said Musammat laid down above in para. 4 of this deed will remain intact only if the Musammat expires after my death, and in the event of her dying during my lifetime, the gift properties in her possession, at her death, will devolve upon me and no one will have any connection and concern therewith. Therefore, I have given in writing these few words in the shape of a deed of gift so that the same may be used (*sic*) when required."

After the defendants had filed their written statements, the following were the main issues framed for trial by the Subordinate Judge :—

"2. Whether the properties covered by these deeds (the deed of 7th August 1896, and a similar deed of earlier date which it superseded) were really the *stridhan* properties of Musammat Mulukrani Kuar."

"4. Whether the properties in suit were her absolute properties."

On the 11th February, 1919, the Subordinate Judge (Lala Damodar Prasad, Esq.) pronounced judgment, holding that, under the deed of gift and particularly clause 1 thereof, which contained the word "*malik,*" the properties in suit became the absolute property of Musammat Mulukrani Kuar, and that the provisions purporting to restrict her alienation thereof were invalid, and he accordingly decreed the suit, remarking as follows :—

The executant gives to Musammat Mulukrani Kuar his entire right and says that she will be Malik, but puts restrictions as said above in her right to transfer the property. The learned pleader for the defendant contends that a gift by a husband to his wife is *prima facie* for her life-time, and that the word "*Malik*" does not give her absolute right, and in support of this contention he relies on the case of *Musammat Sasiman Chowdharani* (1). The learned Counsel on the other side contends that the present case is quite distinguishable from that case, as there the word "*Malik*" was qualified by the words that the wives should be the heirs, the estate of a Hindu widow being a life estate only, while, in the present case, all the rights which the executant had are given to the full extent, and contends that the word "*Malik*" gives a heritable and alienable.

1. (1917) 1 P L W 375.

P. C.

Ashrafi Singh v. Narayan Singh.

estate unless there is anything contrary in the context [*Lalit Mohan Singh Roy v. Chukkun Lal Roy* (2), *Padam Lal* v. *Tek Singh* (3) and *Mussamut Kollany Kooer* v. *Luchmee Pershad* (4).]

No doubt, a gift to a Hindu wife *prima facie* gives her life estate unless there are words indicating that absolute interest was given but in the present case the words *Bazarmul Hadudul Hakuk* clearly indicate that full interest which the executant had was given. The word *'Malik,'* as has been held by the Privy Council in *Bhola Pershad* v. *Ram Lall* (5) gives a heritable and alienable estate unless the context indicates a different intention. Instead of there being such different intention, the words "*Usko Bazarmul Hadudul Hakuk*" clearly indicate intention that the full right which the executant had was to pass, while in the case reported in *Musammat Sasiman Chowdharani* v. *Sibnarain Chowdhary* (1) the word '*Malik*' was qualified by the word 'heir' whose estate was a life estate, so that case is quite distinguishable from the present one. Thus, I am of opinion that the deed of gift gave absolute right to Musammat Mulukrani, subject to certain restrictions as to transfer. Those restrictions are void under S. 11, Transfer of Property Act. I, therefore, hold that absolute title passed to Musammat Mulukrani by the deed of gift, and she had every right to transfer it in any way she liked. I therefore, hold that the Mokarrari document gave a valid Mokarrari title to the plaintiff.

Upon appeal by the 3rd and 4th respondents, the District Judge (Dinanath De, Esq.) on the 25th August, 1919, held that Musammat Mulukrani Kuar took only a life-estate under the deed of gift and that the appellant's patta consequently enured only for her life ; he accordingly allowed the appeal, and dismissed the suit with the following observations :—

The learned Subordinate Judge is of opinion that the expression "the whole collection of rights to their utmost limit regarding the properties (*Usko Bajarmul Hadudul Hakuk*)" in the preamble, and the provision in the 1st clause about the donee being "*malik*" have the effect of creating an absolute right, and the subsequent clauses are mere restrictions to transfer which are void under S. 11 of the Transfer of Property Act. The same view has been pressed upon me on behalf of the respondent. I cannot, however, agree in that view. Both in the judgment of the lower Court and in the argument before me on behalf of the respondent too much stress has been laid upon the words of the preamble. But the preamble does not constitute the deed and in construing a deed like a deed of gift or will it is not a correct procedure to confine one's attention to isolated expressions and attach too much importance to them. The deed requires to be looked to as a whole and all the clauses in it should be considered before any conclusion can be arrived at upon the question of the interest taken under it (vide *Shib Lakshan Bhakat* v. *Srimati Tarangini Dasi* (6) and *Kandarpa Nath Ghose* v. *Jogendra Nath Bose* (7). It is all the more necessary to do so in the present case. The donor expressly

1. (1917) 1 P L W 375. 2. (1897) I L R 24 C 834 at 849.
3. (1906) I L R 29 A 217.
4. (1875) 24 W R 395 at 397. 5. (1896) I L R 24 C 34 (P C).
6. (1908) 8 C L J 20. 7. (1910) 12 C L J 391.

P. C.

Ashrafi Singh v. Narayan Singh.

states in the preamble that he has given the properties subject to the conditions mentioned in the several clauses which follow. So it is not merely the first clause nor a solitary expression in the preamble that determines the nature of the disposition. The cumulative effect of all the clauses will have to be looked to in order to understand the nature of the interest conveyed.

Now so far back as 1874, their Lordships of the Privy Council observed in the case of *Moulvi Mohamed Shumsool Huda* v. *Shewukram* (8) that "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that as a general rule, at all events women do not take absolute estates of inheritance which they are unable to alienate" and this observation was quoted with approval by their Lordships in the case of *Radha Prasad* v. *Ranee Mani* (9). Then the lower Court concedes the proposition that a gift to a Hindu wife by the husband *prima facie* gives her a life estate unless there are words indicating that absolute interest was given.

We thus start with two propositions of law, namely, that a gift of immoveable property by a husband to a wife must *prima facie* be considered to create a life estate, and that, in construing a will or gift made by a Hindu, the ordinary notions and wishes of Hindus will have to be taken into consideration. These principles of law are to be applied when the intention of the donor or testator is not apparent on the face of the deed. In the present case, however we are spared the trouble of deducing the intention. The central idea in the deed is that the property shall be retained in the family and that idea is clearly expressed in the 3rd and the 4th clauses. The donee has been prohibited from bequeathing the property even to her daughter though under the *Mithila* law a daughter is entitled to succeed to the *stridhan* of her mother. Then the 6th clause effectually clinches the matter. It is there laid down that in the event of the death of the donee before the donor the property will revert to the donor. This certainly strikes at the root of the theory that an absolute estate was given. It is settled law and the learned Subordinate Judge accepts it that the word "*Malik*" gives a heritable and alienable estate unless the context indicates a different intention, and the learned Subordinate Judge remarks "Instead of there being such different intention the words "*Usko Bazarmul Hadudul Hakuk*" clearly indicate intention that the full right which the executant had was to pass." As already observed the learned Subordinate Judge has laid too much stress upon an isolated expression occurring not in the operative part of the deed but preamble. In the case of *Lalit Mohan* v. *Chukkun Lal* (2) their Lordships took the entire will into consideration and coming to the conclusion that the *prima facie* legal meaning of the disposing words used not being controlled by the context and no intention being expressed to give a life estate the word "*Malik*" was held to convey an absolute estate. In the judgment of the Lower Court and in the argument on behalf of the respondents the context of the deed appears to be taken to be preamble and the 1st clause and it is sought to find out in that portion of the deed any word indicating an intention different from what is conveyed by the word "*Malik*." The other parts of the deed are considered to be, as expressed by the lower Court, restrictions to alienation.

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2. (1897) I L R 24 Cal 834.

8. (1874) 22 W R 409 (P C). 9. (1908) I L R 35 C 896 (P C).

P. C.

Ashrafi Singh v. Narayan Singh.

I think this is a mistake altogether. It has already been observed that the gift was made subject to the conditions specified in the several clauses. Thus all the clauses were woven together to make up the finished product. All of them must therefore be considered as forming the context and it is found that while in one part of the context the word "*Malik*" appears there is sufficient indication in the other parts of the context "to displace the presumption of absolute ownership implied in the word '*Malik*' and to cut down the full proprietary rights that the word imparts."

The clauses other than the 1st clause are not to be considered as something different from the main purposes of the deed and the lower Court's view about those clauses being merely restrictions to alienation is not correct. That being so S. 11 or 10 of the Transfer of Property Act has no application. The clauses of the deed taken together clearly establish that the donor never intended to give an absolute estate by the deed. We have not to grope about in the dark about the intention for it is expressed in unambiguous terms. Under all these circumstances I hold that Musammat Mulukrani Kuar obtained only a life estate under the deed of gift and consequently the Mokarrari lease given to the plaintiff enured during her lifetime only. The plaintiff has no subsisting right on the basis of the lease and so the suit must fail.

Upon further appeal by the appellant to the High Court at Patna (Ross and Coutts, JJ.), this latter judgment was on the 16th January, 1922, affirmed. [See *Ashurfi Singh* v. *Bisesswar Partap Narayan Sahi* (10).]

The plaintiff appealed to His Majesty in Council.

De Gruyther, K. C. and *Raikes* for appellant, referred also to *Fateh Chand* v. *Rup Chand* (11).

Dunne, K. C. and *Kenworthy Brown* for the Court of Wards (representing the 3rd and 4th defendants), were not called upon.

9th May, 1924. The Judgment of the Board was delivered by

Lord Shaw.

LORD SHAW :—Everything that could be said in favour of this appeal has been admirably said by the learned Counsel for the appellant. Their Lordships adopt the opinion of the Court below, which is appealed from, but desire only to say that they cannot see their way to acquiesce in the characterisation of the conveyance of the *malik* as occurring in a preamble in the deed. When the deed is looked at, it is seen that the actual gift to the donee of the *malik* is that which, although characterised as in the preamble, is in truth in the substantive disposition.

With that correction, however, full assent must be given to the proposition that the deed as a whole must be looked to.

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10. (1922) I L R 1 Pat. 295 11. 43 I A 183.

P. C.

Ashrafi Singh v. Narayan Singh.

Lord Shaw.

In the primary clause, called erroneously a preamble, and now referred to as the actual portion constituting the gift, these words follow the gift—" and all rights appertaining thereto with the following conditions." It appears to their Lordships that that fundamentally affects the construction of the deed as a whole, because the whole balance of the document consists in the insertion of those very conditions under which the deed of gift is accomplished. So construed, the deed as a whole leaves no room for doubt that it did not confer the *maliki* rights without conditions, nor did it confer on the donee those rights of property and alienation which a bare disposition in favour of a person denominated as *malik* would have involved.

On the whole, without entering upon details, the decision arrived at appears to their Lordships to be sound in principle and in accord with authority, and their Lordships will humbly advise His Majesty that the appeal be disallowed with costs.

Solicitors for appellant *Watkins and Hunter*.

Solicitor for respondents (Court of Wards) : *Solicitor to the India Office*.

A. de M. *Appeal disallowed.*

PRIVY COUNCIL

(On Appeal from the Court of the Judicial Commissioner of Oudh.)

PRESENT :—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

Mitra Sen Singh and others *Appellants**

v.

Musammat Janki Kuar and others *Respondents.*

P. C.

Mitra Sen Singh v. Janki Kuar.

Evidence Act, S. 115—Suit for possession—Under-proprietor (pukhtadar)—*Compromise decree—Mutation of names in Register—Payment of rent and acceptance by the Court of Wards—Subsequent discovery of error—Effect.*

In pursuance of an agreement of compromise made in the course of a litigation in 1878 between the owner of certain villages and his wife followed by a decree whereby the latter was to have possession of the property as under-proprietor for her life without power of transfer or sale, on payment of under-

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*P C Appeal No. 6 of 1923. 1st July, 1924.

P.C.
Mitra Sen Singh
v.
Janki Kuar.

proprietary dues, and after her death the wife (Sundar Kuar) of her son was to have similar possession for her life, possession of the lands had been successively held as arranged and rents paid in respect thereof till about 1905, when Sundar Kuar, the wife of the son died, and the son in 1906 married another wife (Janki Kuar). This second wife then obtained a mutation of names, paid rent to the Court of Wards and the latter apparently in ignorance of the circumstances, accepted the same, and gave receipts therefor, describing her as *pukhtadar*. In 1914, the Court of Wards discovered their error and instituted a suit against Janki Kuar claiming possession of the villages.

Held (reversing the judgment of the High Court and restoring that of the Subordinate Judge), that (1) the second wife, Janki Kuar, had no heritable proprietary right as *pukhtadar,* nor, under the compromise decree, to possession of the said lands and that accordingly she must surrender possession to the Court of Wards ; (2) the acceptance of rent by the Court of Wards was due to a misapprehension that she possessed the villages on the same title as her predecessor, and did not operate as estoppel, nor create a *pukhtadari* right or right to possession similar to that enjoyed by the previous holders.

Governors of Magdalen Hospital v. *Knotts,* 4 A C 324 distinguished.

In cases of estoppel the onus of establishing the facts and circumstances from which estoppel arises rests upon the person pleading it.

Appeal from a judgment and decree (10th March, 1919) of the Court of the Judicial Commissioner of Oudh, which reversed a judgment and decree (25th April, 1916) of the Subordinate Judge of Fyzabad.

The plaintiffs (appellants) sued to recover possession of three villages, namely, Turchenpur, Mendhi Salimpur and a 10-biswa share in Nurahni Rampur, situate in the District of Fyzabad, and forming part of the Birhar Estate belonging to one Dhup Narain Singh. The wife, Rajau Kuar, had claimed to be in possession of these villages and of another, called Maipur, at the time of the First Regular Settlement of Oudh in her *pukhtadari* right (*i. e.,* as an under-proprietor thereof) and had filed proceedings against her husband, but the parties settled their dispute by a compromise, dated the 27th May, 1878, which provided, amongst other things, as follows :—

"In the case noted above, I, the plaintiff, have claimed an under-proprietary right in 10 *biswas* share in Village Mendhi Salimpur. We, the parties, have agreed to these terms, that in Village Mendhi Salimpur, I, the plaintiff, shall remain in possession of the defendant's share as under-proprietor during my lifetime without the power of transfer and sale ; that after my (the plaintiff's) death the wife of Babu Kalka Bakhsh Singh, my son, shall also enter into possession without the power of alienation and sale and any other person shall have nothing to do with it ; that I shall continue to pay the Government land revenue and 15 per cent. the profits to the Taluqdar-defendant."

P. C.

Mitra Sen Singh v. Janki Kuar.

Similar compromises were made in respect of other villages, and the Court passed decrees in accordance therewith, and the name of Musammat Rajau Kuar was recorded in the Register of Proprietors as a *pukhtadar* thereof. On her death in 1901, the name of Musammat Sundar Kuar, wife of Kalka Bakhsh Singh, the son of Dhup Narain Singh, was similarly recorded as an under-proprietor ; and when Sundar Kuar died in 1905, Janki Kuar, who was married to the said Kalka Bakhsh Singh in 1906, claimed to have succeeded to, or obtained, possession of the villages as an under-proprietor, and to have since remained in possession thereof on payment of the rent specified in the compromises mentioned above.

On the death of Dhup Narain Singh, his son, Kalka Bakhsh Singh sold all his right and interest in the villages to the Court of Wards of the United Provinces of Agra and Oudh in charge of the Estate of Ugra Sen Singh and Mitra Sen Singh, etc., (appellants) on the 23rd October, 1902.

On the 7th February, 1908, Janki Kuar and her husband, Kalka Bakhsh Singh, sold the under-proprietary rights in the village of Maipur to discharge a prior mortgage thereon which had been effected by Musammat Rajau Kuar, deceased, and Dhup Narain Singh, on the 1st September, 1888. She similarly discharged other mortgages relating to the villages in dispute.

On the 13th February, 1914, the Court of Wards instituted the present suit in the Court of the Subordinate Judge of Fyzabad alleging in their plaint—

"that after the death of the said Sundar Kuar, Babu Kalka Bakhsh Singh had no wife living and therefore the rights granted to his wife under the deed of compromise extinguished and the defendant No. 1's (*i. e.*, 1st respondent's) possession over the said villages is unlawful and by way of usurpation."

and they therefore claimed a decree for possession thereof, with mesne profits and costs.

Janki Kuar (the 1st respondent) alone contested the plaintiff's suit, and filed a written statement. She pleaded, among other things, that she was lawfully in possession of the villages in dispute under the terms of the compromise mentioned above ; that she held them in *pukhtadari* right, and that the plaintiffs were barred by estoppel from denying her right.

The Subordinate Judge (R. D. Shukla, Esq.) delivered judgment on the 25th April, 1916, holding that, under the

P. C.
Mitra Sen Singh v. Janki Kuar.

terms of the compromise quoted above, Musammat Rajau Kuar and Sundar Kuar possessed under-proprietary rights in the villages for the terms of their respective lives, and that, on the death of the latter on the 7th December, 1905, these rights lapsed and reverted to the grantor, Dhup Narain Singh's son, Kalka Bakhsh Singh. In other words, he was of opinion that the first respondent was married to Kalka Bakhsh Singh on the 15th April, 1906, after the estate had lapsed to the grantor. He also held that the ladies did not possess a hereditable interest in the under-proprietary villages, and that the plaintiffs were not estopped from asserting their right against this respondent.

In the result, the Subordinate Judge allowed the plaintiffs' claim, and made a decree for possession in their favour, but without mesne profits. From that decree, the first respondent appealed to the Court of the Judicial Commissioner of Oudh, which (Kanhaiya Lal and Daniels, J. Cs) delivered judgment on the 10th March, 1919 declaring the plaintiffs estopped from denying the *pukhtadari* or under-proprietary rights of the first respondent, and therefore allowed the appeal, set aside the decree of the said Subordinate Judge, and dismissed the plaintiffs' suit with costs. The plaintiffs appealed to His Majesty in Council.

E. B. Raikes for appellants.

B. Dube for respondent.

1st July, 1924. The Judgment of the Board was delivered by

Lord Shaw.

LORD SHAW :—This is an appeal from a decree dated the 10th March, 1919, of the Court of the Judicial Commissioner of Oudh, which reversed the decree dated the 25th April, 1916, of the Subordinate Judge of Fyzabad.

The appellants are the plaintiffs in a suit for possession of certain villages. They also claimed mesne profits, a claim which was rightly disallowed and of which no more need be said. What remains is the suit for possession itself. Both the Courts before whom the suit came in India held that the plaintiffs' title to the villages was proved. Their Lordships are in entire agreement with that conclusion.

The Trial Judge decreed the suit for possession. The Appellate Court dismissed it on the ground that the appellants

P. C.

Mitra Sen Singh v. Janki Kuar.

Lord Shaw.

were estopped from denying all claim of the first respondent to hold the villages for life as an under-proprietor without power of alienation. The only question in the appeal is whether the appellants' suit fails by reason of this alleged estoppel. In the opinion of the Board it does not so fail, and the appellants are not estopped.

The villages are in the Fyzabad district and were the absolute property of one Dhup Narain Singh. He was the owner of the talukh which embraced them. On his death his wife, Rajau Kuar, claimed to be in possession of these villages as *pukhtadar*. Had she been so she would have been an under-proprietor with a right both heritable and transferable. In May, 1878, this question having been raised in Court, was settled by a compromise ; and it is to the terms of that compromise that both parties refer. These terms are as follows :—

"In the case noted above I, the plaintiff, have claimed an under-proprietary right in 10 *biswas* share in Village Mendhi Salimpur. We, the parties have agreed to these terms, that in Village Mendhi Salimpur I, the plaintiff, shall remain in possession of the defendant's share as under-proprietor during my life-time without the power of transfer and sale ; that after my (the plaintiff's) death the wife of Babu Kalka Bakhsh Singh, my son, shall also enter into possession without the power of alienation and sale and any other person shall have nothing to do with it ; that I shall continue to pay the Government land revenue and 15 per cent. the profits to the Taluqdar defendant."

Rajau Kuar had possession of the villages under the agreement of May, 1878, till her death in 1901, when her rights of course came to an end. Musammat Sundar Kuar, the wife of Kalka Bakhsh Singh, under the terms of the agreement of compromise thereafter possessed the villages, but her rights ceased with her death in 1905.

As the Judicial Commissioner properly observes in his judgment " Kalka Bakhsh Singh is not shown to have had any other wife then alive. The limited rights created by the compromise, therefore, came to an end on the expiry of the above life estates ; and the property, which was the subject of these rights, subsequently reverted to the heir and successor in interest of the grantee then in existence. As Kalka Bakhsh Singh, the son and successor of the grantor, had sold his entire right, title and interest in the property in dispute to the Court of Wards. the vested interest he held in the reversion passed by the sale to the Court of Wards, who became entitled to that reversion on her death."

P. C.

Mitra Sen Singh v. Janki Kuar.

Lord Shaw.

In 1906 Kalka Bakhsh Singh married a second wife and there is no doubt of the fact that she remained in possession for a period of about eight years. Further, there is no doubt that she obtained a mutation of names, and that she paid rent with 15 per cent. for collection to the talukhdar, that is to say, to the Court of Wards. It is upon these facts that the claim of estoppel arises.

The assertion made when mutation of names was obtained was of course erroneous and must have been so to her knowledge. Musammat Janki Kuar was entitled neither to be entered in the under-proprietary registry as a *pukhtadar,* nor had she under the compromise agreement, which was the sole basis of title which could be founded upon, any rights whatsoever to possession of the villages. Very possibly what happened was simply that the Collector and the officials charged with the mutation record assumed that she, another wife of Kalka Bakhsh Singh, was possessing the same villages on the same title as her predecessor. Two officials were examined (one a translator and petition writer in the Civil Court who identifies the signatures of the Zilladars, the other the Zilladar and collector of rates) and they gave evidence that the Court of Wards made no enquiries about the status of the persons to whom the receipts were issued or whether the defendant was in truth the *pukhtadar.*

The Court of Wards, however, has discovered the mistake which has been made and the fact that Musammat Janki Kuar had no title whatsoever to the *pukhtadari* rights; and the present suit has been brought.

With all respect to the Court of the Judicial Commissioner it is difficult to understand how the doctrine of estoppel applies to a case of this character. There is no peculiarity in the law of India as distinguished from that of England which would justify such an application. The law of India is compendiously set forth in S. 115 of the Indian Evidence Act, Act I of 1872. It will save a long statement by simply stating that section, which is as follows :—

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

P. C.

Mitra Sen Singh v. Janki Kuar.

Lord Shaw.

There seems no place upon the facts for the suggestion that the Court of Wards has intentionally caused or permitted Janki Kuar to believe it to be true and to act upon the belief that she was a talukhdar or that she had any right of possession under the compromise agreement already alluded to. That point might be quite sufficient to dispose of the case.

But the Court of the Judicial Commissioner goes so far as to declare that what has happened is "tantamount to a waiver for the time being of the right of reversion," and that "the Court of Wards has thus been committed to recognition of the right of Musammat Janki Kuar to succeed to the *pukhtadari* rights under the compromise as if she had been the wife of Kalka Bakhsh Singh when Musammat Sundar Kuar died." Their Lordships fail to understand how the doctrine of estoppel could ever be founded upon for the purposes of the recognition of any such claim or the rearing up of any such right. The whole of this doctrine appears to be founded simply upon the transaction of taking rent each year, but the taking of a rent each year may, and as the Courts have properly held, did, bar by estoppel the Court of Wards from any claim for mesne profits during the particular year or years for which such rent was received. It estopped the Court of Wards from maintaining that the lady possessed the property with a liability to account or possess on any other or further terms than on payment of the rent made and taken.

But there estoppel stops and it can never be reared up into the creation of a *pukhtadari* right of a proprietary, heritable and transferable character, nor can it ever create a right of possession of the property for life under the same terms as some other person had previously possessed it upon. Such foundations of title are unknown and they can never be created in such a manner.

At their Lordships' Bar Mr. Dube ingeniously argued that there were, however, other circumstances which might be founded upon for the purpose of producing such rights either of permanent ownership or possession for life. Even were such a thing legally possible, it need only be remarked that in cases of estoppel the onus of establishing the facts and circumstances from which estoppel arises rests upon the person pleading it. No facts and circumstances whatsoever, apart from the occupation, appear to the Board to have been established in this case. Their Lordships must decline to accept statements

P. C.

Mitra Sen Singh v. Janki Kuar.

Lord Shaw.

made in another suit (one which was dismissed) on the subject of the payment of mortgages resting upon properties. It is nowhere established that this lady ever disbursed any payments of the kind, and it has to be remarked, in conclusion, that she herself, who knew all the facts and the circumstances of the situation, did not give evidence in the case. On examination accordingly the case for estoppel seems to be ill-founded in law, and if it were well-founded in law seems to be quite unsubstantiated in fact.

The decision in the case of *Governors of Magdalen Hospital* v. *Knotts* (1), which was referred to in discussion, afforded no help to the respondents because, as observed by Lord Selborne, a long term was " attempted to be granted by a charitable corporation at a peppercorn rent. If any rent had been reserved and received, however small, the legal relation of a tenancy *from year to year* would have been created, and the Statute of Limitations could not have run."

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the decree of the Trial Judge be restored with costs since that date in the Courts below, and with the costs of this appeal.

Solicitors for appellants : *Watkins and Hunter.*

Solicitors for respondents : *Barrow, Rogers and Nevill.*

A. de M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Chidambara Gurukkal *alias* Devendrasiva Puranthara Pandithar ... *Appellant** (*Plaintiff*)

v.

Sivagnana Sundaram Pillai and others ... *Respondents* (*Defendants*).

Chidambara Gurukkal v. Sundaram Pillai.

Madras Estates Land Act, S. 3 (d)—Applicability—Small plot of land—Suit by inamdar against tenant—Rights of parties—Considerations—Permanent occupancy rights—Payment of uniform and fixed rent —Inference—Kandayam—Meaning of.

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*S. A. No. 362 of 1921. 8th February, 1924.

1. 4 App. Cas. 324.

S. 3 (*d*) of the Madras Estates Land Act does not in terms apply to a suit by an *Inamdar* against his tenant where the property consists not of a village but only of a small plot of land. But even in such a case the question whether the *inam* grant was of both *varams* or only the *melvaram* must be decided with reference to considerations similar to those that would apply if the case fell within that section. Where the Court below on a consideration of all the circumstances come to the conclusion the grantee was not the owner of both *varams* the finding cannot be challenged in Second Appeal.

Where the origin of a tenancy is not known evidence of acts and conduct of the parties constitute the best and only evidence to prove the nature of the tenancy. Where the tenants for three generations have been in occupation without any alteration in terms and on payment of a uniform and fixed rent far below the economic rent, a Court can infer permanent rights of occupancy. 36 M. L. J. 463 ; 2 L. W. 723 followed.

In deciding whether the tenants have permanent rights of occupancy the Court has to find whether their predecessors possessed such rights at the inception of the relationship, unless a subsequent change is suggested.

Meaning of " Kandayam " referred to.

Second Appeal against the decree of the Court of the 2nd Additional Subordinate Judge of Coimbatore in A. S. No. 5 of 1920 (A. S. No. 243 of 1920 on the file of the District Court of Coimbatore) preferred against the decree of the Court of the Principal District Munsif of Erode in O. S. No. 326 of 1919.

S. T. Srinivasagopalachariar for appellant.

T. M. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—This appeal arises out of a suit by an inamdar against his tenant.

The first question to be decided is whether the grant to the predecessor of the plaintiff was of the land, or the grantee not owning the kudivaram, of the land revenue only. S. 3 (*d*) of the Estates Land Act does not in terms apply because the suit concerns not a village but only a small plot of land. The point has however to be decided with reference to considerations similar to those that would apply if the case fell within that section. If the grant were forthcoming it would be the most valuable evidence but unfortunately the grant is not before the Court, although it is agreed that the land was granted some centuries ago during the period of the Madura Kings. The learned Subordinate Judge has on a considera-

Chidambara Gurukkal v. Sundaram Pillai.

tion of the materials before him come to the conclusion that the inamdars were entitled only to the melvaram. I agree with him. Proceedings connected with the inam enquiry are relied upon by both the parties. At the enquiry, the inamdar made the statement that the land was let to ryots for " Kandaya " cultivation. The Subordinate Judge is of the opinion that this supports the defendants' case. The word "Kandayam" is defined as being either a fixed portion of the tax payable or rent paid in money as distinguished from rent paid in kind (*see* McLean's *Manual of Administration of the Madras Presidency*). The Judge presumably thinks that the word is used in the inam statement in the former sense and I am not prepared to say that he is wrong. The inam title deed is inconclusive. It acknowledges the title of the inamdar to the " inam " and says that it has been subject to a quit rent of Rs. 2-4-0, that the inam has been hereditary but not alienable and liable to lapse on failure of lineal heirs. It then recites " On your agreeing to pay an annual quit rent of Rs. 4-4-0 . . . . your inam tenure will be converted into a permanent freehold ; in which case the *land* will be your own absolute property." On behalf of the plaintiff it is argued that the use of the word " land " denotes that the original grant was of the soil. This contention, I am not prepared to accept. The word " land " is not used with special reference to the subject of the grant. The words " Inam " and " land " are used indifferently and in the context no significance attaches to the use of the particular word " Land " The tenants are not parties to this document and there was no occasion to refer to the rights of the inamdar as distinguished from those of the tenants. The plaintiff next relies upon a receipt for rent executed by himself. It refers to " My inam Vengayam Kadu which belongs to me." It is said that this contains an assertion by the inamdar that he was the owner of the land. A similar argument was advanced with reference to the statement of the inamdar made at the inam enquiry—"The lands are let to ryots . . . . " Even where the tenant is admittedly possessed of the kudivaram, the landholder refers to his melvaram right as land and therefore no inference favourable to the plaintiff can be drawn from the circumstance. It is true that there is no presumption that an inam grant is a grant of the land revenue only and that each case must be decided with reference to the circumstances connected with it. But the

Chidambara Gurukkal v. Sundaram Pillai.

Subordinate Judge has on a consideration of all the circumstances come to the conclusion that the grantee was not the owner of both the varams, and I am not prepared to interfere with this finding.

Granting that the inamdar was possessed of both the varams, the next question to be decided is whether the defendants have proved the existence of a permanent tenancy. The Court has to find whether the defendants' predecessors possessed occupancy rights at the inception of the relations of the parties, not whether there was a subsequent change in those relations, the latter alternative not having been suggested [see *Sethuratnam Iyer* v. *Venkatachala Goundan* (1)] and when the origin of a tenancy is not known evidence of the acts and conduct of the parties constitutes the best and the only evidence to prove the nature of the tenancy. [See *Ismail Khan Mahomed* v. *Jaigun Bibi* (2)]. It has been contended that permanence if claimed must be established and that the burden of proof lies on the tenant. The learned Subordinate Judge has found that the true inference from the facts proved is that the tenure is permanent and not precarious. Granting that the onus is on the tenant the Subordinate Judge has found that the defendants have made out their case and I am not prepared to disturb his finding. For at least three generations the defendants' family have been occupying the land without any alteration in terms and during that period the rent has been far below the economic rent and a uniform and fixed rent has been paid. The plaintiffs have not been able to give any evidence that at any time a different rent was paid or the rent was ever enhanced. It is suggested on behalf of the plaintiffs that they were absentee landlords, that when they went to the village of the defendants, the latter who were karnams attended to the wants of the plaintiffs and that it was likely that a low rent was fixed on account of these considerations. This has not been accepted by the lower Appellate Court as an explanation. The facts suggested on the one side and the uniform and low rent on the other have not been shown to be related as cause and effect. It is quite as likely that because the defendants and their ancestors have been tenants of the plaintiff's family the former have from time to time rendered small services to the latter. The Judge was entitled to infer from the continuance

1. (1919) I L R 43 M 567 at 577 38 M L J 476 (P C).

2. (1900) I L R 27 C 570 at 582.

Chidambara Gurukkal v. Sundaram Pillai.

of the land in the same hands at a low and unvarying rent, permanent rights of occupancy. *Ponniah Nadan* v. *Deivani Ammal* (3) and *Palaniyandi Malavarayan* v. *Vadamalai Odayan* (4).

In the result the Second Appeal fails and is dismissed with costs but subject to the following reservation. The defendants do not object to a decree being passed in favour of the plaintiff for the rent admitted by them to be due, and I accordingly pass a decree for Rs. 54. With this modification the lower Appellate Court's decree will be confirmed.

T. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Lakshmanan Chettiar (dead) and others *Appellants** (*Plaintiff and his legal representatives*)

v.

Sella Muthu Naicker and others *Respondents* (*Defendants Nos.* 1, 6, 7 *and* 8 *and a legal representative of the deceased Plaintiff added as party respondent*).

Lakshmanan Chettiar v. Sella Muthu Naicker.

Limitation Act, Arts. 132 *and* 148—*Mortgages—Prior and subsequent—Suit by prior mortgagee—Puisne mortgagee not impleaded—Sale and purchase by assignee from prior mortgagee—Subsequent suit by puisne mortgagee—Purchase in execution—Suit for redemption—Limitation.*

The suit properties were subject to two mortgages. The prior mortgagee obtained a decree on his mortgage without impleading the subsequent mortgagee. The assignee of this decree purchased it himself in execution. Subsequently the puisne mortgagee brought a suit on his mortgage without impleading the assignee decree-holder purchaser and in execution of the decree became the purchaser himself. He then brought a suit for redeeming the prior mortgage more than 12 years from the date of his own mortgage but less than 60 years from the date of the prior mortgage. *Held,* the right of a puisne mortgagee to redeem is only ancillary to his right to work out his remedy against the mortgaged estate and must be considered to be only a means of securing the object of enforcing his own claim by sale. Art. 132, Limitation Act, would govern the suit and not Art. 148, and the suit was barred. 14 C W N 439 followed ; 21 M L J 213 ;

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*S. A. No. 974 of 1921. 11th April, 1924.

3. (1919) 36 M L J 463.

4. (1915) 2 L W 723.

Lakshmanan Chettiar v. Sella Muthu Naicker.

24 Mad. 171; 26 Mad. 537; and *Ramsbottam* v. *Wallis*, 5 L J N S Ch 92 referred to.

Second Appeal against the decree of the Court of the Subordinate Judge of Madura in A. S. No. 165 of 1919 (Appeal Suit No. 115 of 1919 on the file of the District Court of Madura) preferred against the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 847 of 1917.

T. M. Krishnaswami Aiyar for appellants.

C. S. Venkatachariar for respondents.

The Court delivered the following

JUDGMENT:—The question of law argued in this Second Appeal is one of limitation. The facts of the case are not disputed. The 1st defendant, who was the assignee of the mortgage decree in O. S. No. 380 of 1897 obtained by one Andiappa on the foot of a mortgage, dated the 9th of August, 1891, purchased the mortgaged properties at the auction sale. To this suit the plaintiff-appellant, who was a subsequent incumbrancer holding a simple mortgage, dated the 9th of September 1895 was not a party. Similarly the 1st defendant was not impleaded as a party to O. S. No. 207 of 1908 brought by the plaintiff to enforce his own mortgage. The plaintiff obtained a decree in his suit and in the course of execution of his decree purchased items 1 and 2 which are the only items we are concerned with in this Second Appeal. The plaintiff in the suit out of which this Second Appeal arises claims redemption and possession of items 1 and 2 and is met with the plea that his suit is barred by limitation under Art. 132 of the Limitation Act inasmuch as he did not bring his suit within twelve years from the due date of his own mortgage. It is undisputed that, if Art. 132 applies, the plaintiff's suit would be barred by limitation as his suit has been brought more than twelve years from the date of his mortgage. The lower Appellate Court accepting the plea of the defendant has dismissed the suit as barred by limitation.

It is argued by the plaintiff-appellant that his suit is one for redemption and that Art. 148 of the Limitation Act applies to the facts of the case and, if so, his suit is well within time. Reliance is placed on the observations in *Mulla Vittil Seethi* v. *Achuthan Nair* (1) dealing with the rights of the second mortgagee to redeem the first mortgagee. It is no doubt true that

1. (1911) 21 M L J 213.

Lakshmanan Chettiar v. Sella Muthu Naicker.

the second mortgagee has the right of redeeming the first mortgagee, but that right is not as absolute as it is sought to be made by the learned vakil for the appellant. The right of a puisne mortgagee to redeem is only ancillary to his right to work out his remedy against the mortgaged estate (*see* Fisher on *Mortgage,* p. 741, para. 1448). He is only permitted to redeem for the purpose of working out his own security [*Ramsbottam* v. *Wallis* (2)]. The right of a puisne mortgagee to redeem the prior mortgagee in a case where he had not been joined in a suit on the first mortgage is described in *Muhammad Usan Rowthan* v. *Abdulla* (3) as the right to redeem that mortgagee (*i. e.,* first mortgagee) with a view of enforcing his own mortgage [see also *Goverdhana Doss* v. *Veeraswami Chetty* (4)]. His right to redeem the first mortgage must be considered to be only a means of securing the object of enforcing his own claim by sale. It appears, therefore, that the proper article of the Limitation Act applicable to this case is Art. 132. This view is supported by a decision of the Calcutta High Court reported in *Nidhiram Bandopadhya* v. *Sarbessur Biswas* (5). In that case as in the present one, a prior mortgagee sued on his mortgage without making the second mortgagee a party and in execution of the decree obtained by him purchased the property himself and subsequently the second mortgagee also sued on his mortgage without making the prior mortgagee a party and purchased the property in execution of the decree. A suit was then brought by the second mortgagee to redeem the prior mortgagee-purchaser more than twelve years after the due date of his mortgage. It was held that the second mortgagee as purchaser in execution of the decree obtained on his mortgage acquired only the right which he had under his second mortgage and that he can enforce his rights on the second mortgage by suit as against the prior mortgagees only within the period of twelve years from the due date of his mortgage as provided for in Art. 132 of Schedule II of the Indian Limitation Act. Applying this decision to the present case, I hold that the plaintiff's suit is barred by limitation. It was then suggested that Art. 97 would apply, but the point was not pressed by the learned vakil for the appellant.

The Second Appeal fails and is dismissed with costs.

T. S. V. *Appeal dismissed.*

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2. 5 L J N S Ch 92. 3. (1900) I L R 24 M 171 at 174 : 10 M L J 347.
4. (1902) I L R 26 M 537. 5. (1909) 14 C W N 439.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Rajagopala Padayachi *Appellant** (*Plaintiff*)

v.

Varadaraja Padayachi *Respondent* (*1st Defendant*)

Rajagopala Padayachi *v.* Varadaraja Padayachi.

Hindu Law—Partition—Annuity granted to one of the members in lieu of share—Provision for resumption of share in default of payment of annuity—Penalty—Relief against—Contract Act, S. 74.

At a partition between three brothers forming a joint Hindu family the properties were divided into three shares and the properties falling to the share of one of the brothers were added to the shares of the other two brothers in equal moieties in consideration of his getting an annuity from them severally. There was a provision in the partition deed that if there was default in payment of the annuity, the annuitant should be entitled to resume that portion of his share which had gone to the defaulter. One of the brothers having made default in payment of his share of the annuity, the annuitant sued for resumption of the properties allotted to him at the partition but the lower appellate Court decreed the arrears of the annuity and relieved the defendant against the resumption of the properties holding that the stipulation was by way of penalty. *Held,* that the stipulation in the partition deed for resumption of the share on default of payment of the annuity was not penal but merely amounted to a withdrawal of a privilege given to the other brothers at the partition and that the plaintiff was entitled to a decree for possession.

Second Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 79 of 1921 (A. S. No. 51 of 1921, District Court) preferred against the decree of the Court of the District Munsif of Mannargudi in O. S. No. 249 of 1920.

T. L. Venkatrama Aiyar for appellant.

C. Narasimhachariar for respondent.

The Court delivered the following

JUDGMENT :—Appeal against the decree of the Subordinate Judge of Cuddalore in A. S. No. 79 of 1921 (O. S. No. 249 of 1920, District Munsif's Court, Mannargudi).

The appellant was one of three brothers and at the time of partition it was agreed that instead of taking his share of the land, he should receive an annuity in moieties from his two brothers, and if either defaulted, he should resume that portion of his share which had gone to the defaulter. In Schedule D, of the partition deed, Ex. C, the two halves which make up his

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*S A No. 158 of 1922. 28th July, 1924.

Rajagopala Padayachi v. Varadaraja Padayachi.

share are shewn as severally added to the shares of each of the other brothers. The respondent made default and appellant sued for arrears of annuity, and for the resumption of his half share from the defaulter. The original Court decreed his suit, but the Subordinate Judge on appeal while decreeing the arrears, relieved respondent against the resumption of the half share holding that it was by way of penalty. Hence this appeal. It is contended on behalf of respondent that when once the lower Courts have found that a stipulation is by way of penalty, it is a decision on a question of fact which cannot be traversed on Second Appeal. The question is whether the stipulation can legally be said to be within the purview of S. 74, Indian Contract Act, and the frequency with which this point has been raised on Second Appeal is in itself a guarantee that it is a question of law. However, it has always been conceded that there is no absolute rule of law which determines the matter, but each case has to be considered according to its particular circumstances. The exact wording and frame of Ex. C are therefore important. The appellant refrained from taking his share of the land because as set forth in the document he was a bachelor. Besides the land, there were certain debts and outstandings which were divided between the two other brothers, and each agreed to give the appellant Rs. 100 who also got a *manai* and right of way. Then there is the arrangement mentioned above in regard to the annuity and resumption of Schedule D lands in default of its payment. It was argued that because respondent and his brother got appellant's share of the land they relieved appellant of the full burden of family debt, but I find no warrant for any such assumption in the document. Apparently it was reckoned that on a balance the debts and outstandings were worth Rs. 200 and that amount was paid in cash to the appellant. If his brothers lost by taking over these transactions presumably there would have been no cash payment. I think it must be taken that the document does what it sets forth to do, and make a fair division between the three brothers. The lands are equally divided in Schedules A, B, D and the D Schedule share is equitably commuted to an annuity because so long as he got an annuity the appellant did not want the land. The question then for determination is whether the provision that appellant resumes his share of the land on default of payment is by way of penalty. In most cases in which this question arises

Rajagopala Padayachi v. Varadaraja Padayachi.

there is a primary contract, and then a secondary contract by which the promisor binds himself to give something over and above his original liability to the promisee if he should commit laches in regard to the primary contract. Under S. 74 a Court must consider what reasonable amount of damages on account of such laches is due to the promisee and to find accordingly. See Wallis, C. J., in *Muthukrishna Aiyar* v. *Sankaralingam Pillai* (1). See also Sundara Aiyar, J., at page 265, "The Court will carry out the primary contract but not necessarily the subsidiary contract to come into operation if the primary contract is broken." In the present case what is the subsidiary contract? The appellant is not to receive anything extra by way of damages, and the respondent is not to be mulcted on account of his failure to pay the annuity. The arrangement as regards the annuity having broken down, the appellant is to resume his normal position as third member of the divided family enjoying a third share of the property. The contrary view can only be maintained on the assumption that the partition was unfair, and the arrangement that he was to be paid an annuity gave the appellant less than he would have got if he took the land an assumption for which there is no warrant. If the contracting parties are merely remitted to their original position there can be no question of penalty. Cf. *Pasupaleti Achyamma* v. *Pabbamidi Papamma* (2), and even assuming that appellant gave more than he needed when he entered into this arrangement, the mere withdrawal of a privilege is no penalty. Cf. *Davis* v. *Thomas* (3). This view has prevailed where a lower rate of interest was allowed as a matter of grace if payment was punctual, *Kulada Prasad Chowdhury* v. *Ramananda Pattnaick* (4).

In the case cited by the learned Subordinate Judge, *Thayammalachi* v. *Sevu Rajali* (5), there was relief against forfeiture. I do not think that the present case can be described as forfeiture. A return to the *status quo* at the time when the agreement was entered into does not vest the property in the respondent. So he cannot be said to forfeit what at that time was not his. Nor do I think anything is to be gained by way of analogy by describing respondent as a transferee of property with a contingent interest, or as a tenant. What the

1. (1913) I L R 36 M 229 at 248 : 24 M L J 135 (F B). 2. 2 I C 850.
3. 1 Russel and Mylne, 506. 4. (1921) I L R 48 C 1036.
5. (1911) 2 M W N 327.

Rajagopala Padayachi v. Varadaraja Padayachi.

Court has to enforce is an agreement of partition. The brother does not say " you shall hold my land at such and such a rent, but my share shall be satisfied in such and such a way." We should, as Napier, J., observes in *Krishna Shetti* v. *Gilbert Pinto* (6), be very careful in applying statutory provisions that are not in *pari materia*. I do not find the stipulation that appellant shall resume the land in Sch. D on default of payment of his annuity to be penal, and therefore I restore the decree of the Original Court. This appeal is allowed with costs in this and the lower Appellate Court and as provided in the original decree.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Puttayya *alias* Krishnayya Shanbaga and others *Appellants* (Petitioners Plaintiffs 2 to 4 and 6).*

v.

Puttannayya and another *Respondents (10th Defendant and Surety).*

Puttayya v. Puttannayya.

Limitation Act, Art. 182—Application to revive pending execution—Limitation—Starting point—Joint decree—Application to execute against some judgment-debtors—Saving of limitation against others.

Execution proceedings are not closed by the Court merely recording them, and the decree-holder's right to apply for their continuance accrues from day to day and will not be barred until three years have elapsed after the proceedings have ceased to be pending.

Chalavadi Kotiah v. *Poluri Alamelammah,* I L R 31 M 71 ; *Subbachariar* v. *Muthu Veeran Pillai,* I L R 36 M 553 relied on.

Where a decree has been passed jointly against defendants 9 and 10 for recovery of possession, and against defendants 1 to 8 for recovery of certain sums of money and against the 9th defendant severally in respect of certain sums of money, an application for execution against the 9th defendant alone keeps the decree alive as against the 10th defendant under Explanation 1 to Art. 182 of the Limitation Act.

Subramania Chettiar v. *Alagappa Chettiar,* I L R 30 M 268 followed.

Appeal against the appellate order of the Court of the Subordinate Judge of South Kanara in A. S. No. 7 of 1922 (A. S. No. 100 of 1922 on the file of the District Court of

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*A A A O No. 38 of 1923. 22nd July, 1924.

6. (1918) I L R 42 M 654 at 660 : 36 M L J 367.

South Kanara) preferred against the order of the Court of the District Munsif of Udipi in R. E. P. No. 704 of 1921 in O. S. No. 77 of 1903.

B. Sitarama Rao for appellants.

K. P. Sarvothama Rao for respondents.

The Court delivered the following

JUDGMENT :—In A. S. No. 7 of 1922 in the Court of the Subordinate Judge of South Kanara from the order passed in R. E. P. No. 704 of 1921 in the Court of the District Munsif of Udipi, the Sub-Judge confirmed the order of the District Munsif dismissing an application for delivery of property under the decree in O. S. No. 77 of 1903 of his Court. Plaintiffs 2 to 4 and 6 appeal. The application was presented on 31st August, 1921, and will be time-barred unless (1) an application of 11th March, 1915, R. E. P. No. 323 of 1915 is held to have been pending beyond 31st August, 1918 and effective as keeping alive the right of execute.; (2) applications R. E. P. No. 944 of 1918, R. E. P. No. 622 of 1920 against 9th defendant are held to keep the decree open as against the 10th defendant.

It so happens that the first ground was only raised in the lower Appellate Court and this second ground was only raised in the original Court and therefore, although this is a Second Appeal each ground has been considered below by only one Judge. The grounds involve points of law and I cannot say that appellants' procedure is illegal, but it is not to be commended. The application R. E. P. No. 323 of 1915 is discussed in para. 2 of the lower appellate judgment. The application was filed on 11th March, 1915. There was an obstruction which appellants proceeded to remove by E. A. No. 190 of 1915. But obstructions were not finally removed until 18th December, 1916. From that date the lower Appellate Court holds that time must begin to run in regard to R. E. P. No. 323 of 1915 and an application for its revival is clearly barred at the date 1921. This accords with the Full Bench ruling in *Suppa Reddiar* v. *Avudai Ammal*(1). R. E. P. No. 704 of 1921 must be treated not as an application for execution but as an application to revive an application for execution that had been wrongly dismissed and time began to run from the date

1. (1904) I L R 28 M 50 (F B).

Puttayya v. Puttannayya.

of the appellate decree declaring the respondent's right to execute. But this ruling has lost its effective force owing to the ruling in *Chalavadi Kotiah* v. *Poluri Almelammah* (2) which holds that no application to revive is necessary. The execution proceedings are not closed by the Courts merely recording them, and the decree-holder's right to apply for their continuance accrues from day to day. This decision is approved in *Subbachariar* v. *Muthu Veeran Pillai* (3) and in my opinion determines the matter. On 27th March, 1916, when it had delivered item 3, the Court recorded the execution petition. The obstruction as regards item 2 was removed by the termination of the suit on 18th December, 1916, and although the right to apply for revival of the petition accrues from that date, the right to apply for continuance accrues from day to day. The point is not free from difficulty as observed by Benson and Abdur Rahim, JJ. in *Subbachariar* v. *Muthu Veeran Pillai* (3) but the decision of Miller and Munro, JJ., affirmed by those learned Judges must be accepted as authoritative. Appellants therefore succeed on the first ground.

Ground No. 2 :—Whether the applications of 1918 and 1920 against the 9th defendant keep the decree open as against 10th defendant depends upon the interpretation of the decree in the light of the latter portion of Explanation 1 to Art. 182, Indian Limitation Act, " Where the decree has been passed jointly against more persons than one. " The decree in O. S. No. 77 of 1903 has been passed jointly against defendants 9 and 10, *re* the recovery of possession (para. 1) and against defendants 1 to 8 jointly *re* certain sums (para. 2) and against 9th defendant severally in respect of certain sums. It must be held that it is a decree passed jointly against more persons than one; and then the application against any one of them shall take effect against them all. The matter is elucidated in *Subramania Chettiar* v. *Alagappa Chettiar* by agent *Palaniappa Chetty* (4). Where the decree awards mesne profits against *A* and *B* jointly and costs against *A*, *B* and *C* an application to execute the decree against *A* and *B* for mesne profits keeps alive the right to execute the decree for costs against *C* because " there has been a joint decree against more persons than one and there has been an application in execution of that

2. (1907) I L R 31 M 71 : 18 M L J 46

3. (1912) I L R 36 M 553 : 24 M L J 545. 4. (1906) I L R 30 M 268.

decree against two of these persons and this application takes effect against all the persons against whom the joint decree was passed."

Puttayya v. Puttanayya.

It is to be noted that their Lordships are regarding the decree as a whole and not splitting it up into groups. They do not find because it is a joint decree as regards mesne profits and a joint decree as regards costs, therefore an execution in regard to mesne profits keeps alive the right to execute in regard to costs.

But the learned District Munsif (para. 18 onwards) splits the decree into groups and finds that it is partly joint and partly several, for which there is no justification in Explanation 1, Art. 182. The decree has been passed jointly against more persons than one, and the fact that in one clause it is passed severally against one person, makes it none the less a decree passed jointly against more persons than one.

The District Munsif only misdirects himself by holding (para. 19) that he cannot treat the decree as an 'integral whole' and that he must treat it as consisting of really two parts or decrees. There is no authority for regarding each clause in a decree as a decree by itself, as the District Munsif himself admits in para. 19, line 29. Therefore I find that Ground 2 is also valid. The right to execute against 10th defendant has been kept alive by R. E. P. No. 944 of 1918 and R. E. P. No. 622 of 1920.

The appeal is allowed with costs throughout and the petition is remanded to the Court of First Instance for disposal according to law.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

Parigi Venkobacharlu *Appellant* (1st Defendant)*

v.

Samji Radhabayamma and others *Respondents (Defendants Nos. 2 and 3 and plaintiff).*

Venkobacharlu *v.* Radhabayamma.

Civil Procedure Code, S. 11—Decree dismissing suit—Finding as between co-defendants—Not implied in decree nor embodied therein—Appeal if lies.

Where a decree is one of dismissal of a suit, findings in the judgment as between co-defendants which are not necessarily implied in the decree or embodied therein do not operate as *res judicata* and it is not open to the party aggrieved by such findings to appeal against the decree. Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Anantapur in O. S. No. 6 of 1920 (O. S. No. 51 of 1918 on the file of the District Court of Bellary).

L. A. Govindaraghava Aiyar for appellant.

The Advocate-General for respondents.

The Court delivered the following

JUDGMENT :—The 1st defendant is the appellant in this appeal. The appeal relates to findings on certain issues which were raised as between the 1st defendant on the one hand and 2nd and 3rd defendants on the other. The plaintiff sued for partition and the suit was dismissed. The Advocate-General appearing for defendants 2 and 3 raises a preliminary objection that no appeal lies. He argues that the findings now complained against by the appellant are not necessarily implied in the decree nor are they embodied in the decree. They have no operative force. He argues that they will not be *res judicata* and the appellant has no right to appeal against such findings when the decree is a decree dismissing the suit.

The learned Vakil for the appellant refers to the cases in *Ranganathan Chetty* v. *Lakshmiammal* (1), *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2) and *Muthu Pillai* v. *Vedavyasa Chariar* (3). In the first of these cases the decision

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*Appeal No. 212 of 1922. 9th July, 1924.

1. (1913) 25 M L J 379. 2. (1918) 9 L W 180. 3. (1920) 12 L W 277.

Venkobacharlu v. Radhabayamma.

in the first suit on a point arising between the defendants was necessary for the dismissal of the plaintiff's suit. The matter was therefore *res judicata* in the later suit and the defendant (in the first suit) against whom the Court decided ought to have appealed. This decision does not help the appellant except to this extent, *viz.*, for an appeal to lie, it is not necessary that the finding should be actually embodied in the decree. In the present case, Issue 7 could well have been left undecided by the Sub-Judge, if he so chose, and he could have dismissed the plaintiff's suit. The decision on the genuineness of the will is not necessary for the dismissal of the plaintiff's claim. The fact that the Sub-Judge refused to expunge the issue has really no bearing on the matter. At the time he decided to retain it, it was impossible to say how the suit would have ended. We think the Sub-Judge disallowed the costs of the 1st defendant because he thought he instigated the suit and not because of the findings on the issues. The case in *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2) contains observations about the application of *Run Bahadur Singh* v. *Lucho Koer* (4), which are opposed to the view of this High Court in other cases, e. g., *Kelu Nambiar* v. *Chathu Nambiar* (5). Whatever difficulties there may be in reconciling *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2) with the latter case, in which it was held that, where the decision is one based on a finding not necessary for the decision of the suit, the finding is not *res judicata* and in applying it to a case between plaintiff and defendant, those difficulties do not present themselves in this case, which is a case of co-defendants. It may be that the case in *Run Bahadur Singh* v. *Lucho Koer* (4) and *Krishna Behari Roy* v. *Bunwari Lall Roy* (6) can be reconciled, not on the ground suggested by Sadasiva Aiyar, J. in *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2), *viz.*, that *Run Bahadur Singh* v. *Luch Koer* (4) should be confined to a case when the finding is contradictory to the final decree in the case, but on the ground that in *Krishna Behari Roy* v. *Bunwari Lall Roy* (6) an appeal and a second appeal were preferred against the finding, argued without any objection and the appellant having chosen to insist on a decision, is bound by it. This view is supported by *Midnapore Zamindari Co., Ltd.* v. *Kumar Naresh Narayan Roy* (7), where the

2. (1918) 9 L W 180. 4. (1884) I L R 11 C 301.
5. (1918) 9 L W 84. 6. (1875) I L R 1 C 144.
7. I L R 48 C 460 : 47 M L J 23 (P C).

Venkobacharlu v. Radhabayamma.

Privy Council observe that the findings in the earlier suit would not be *res judicata*. In the present case the matter is stronger for the appellant as the finding is between co-defendants. In *Muthu Pillai* v. *Vedavyasa Chariar* (3) Sadasiva Aiyar, J. held that the matter was *res judicata* because there was an appeal against the finding in the first case. It was not between co-defendants.

We are, therefore, of opinion that there is no decree against the 1st defendant—either express or implied—against which it is his duty to appeal and the appeal is, therefore, incompetent. On this ground we dismiss the appeal with costs (on the one-fourth scale, as no notice of objection was given by respondent, subject to the minimum rule).

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

In the matter of Kripasankari Ammal.

Saraswathi Ammal *Petitioner**

v.

Dhanakoti Ammal and others *Respondents.*

Saraswathi Ammal v. Dhanakoti Ammal.

Habeas corpus—*Guardian* de jure—*Application by, in respect of child detained against his will—Considerations applicable to case of—Infant a boy over* 14 *or a girl over* 16—*Wishes of infant if must be given effect to in case of—Law in England and in India.*

On an application by a *de jure* guardian for *habeas corpus* in respect of a child detained against his will, the question of the interests and the welfare of the infant is the dominant question, and the Court must dispose of the application with reference to it. The word "welfare" must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being and due regard must be had to the ties of affection. If the infant is capable of forming an intelligent opinion and expresses its views, the Court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important element and the degree of the child's mental development must to a certain extent weigh with the Court in deciding how far its wishes shall be given effect to. In the same way, the age of the child is also an important factor. There is no inflexible rule in England that in the case of a boy over 14 and in the case of a girl over 16 the

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*Cr. M P No. 326 of 1924. 14th July, 1924.

3. (1920) 12 L W 277.

Saraswathi Ammal v. Dhanakoti Ammal.

Court has no option in the matter and that the wishes of the infant must be given effect to. Even if such a rule obtained in England, it was too artificial to be extended to India where different considerations might apply and different conditions prevail.

On an application under S. 491, Criminal Procedure Code by the mother of a minor girl who was a little over 17 and under 18 for the production of the minor by her step-sister with whom she was living, and for restraining her marriage with a person to whom the mother objected, *held*, on an application of the above principles, that the proper order to be made was that the minor should be freed from all restraint and should be at liberty to go where she chose.

Petition praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased (*i*) to issue a writ in the nature of *habeas corpus* directing the respondents to produce the minor Kripasankari Ammal before the High Court on such date as the High Court may fix to be dealt with according to law, (*ii*) to restrain 1. Dhanakoti Ammal, 2. K. L. Vasudeva Gramani and 3. K. P. Satagoparamanuja Pillai, respondents Nos. 1 to 3 herein by order of injunction from disposing of the said Kripasankari Ammal in marriage to the 4th respondent herein or to any other person, (*iii*) to restrain the 4th respondent herein by an order of injunction from marrying the said Kripasankari Ammal, and (*iv*) to make such other order or orders as the High Court may deem fit to make in the circumstances of the case.

R. N. Aingar, O. Thanikachalam Chetti and *T. N. C. Srinivasavaradachariar* for petitioner.

A. Krishnaswami Aiyar for 1st respondent.

M. Subbaroya Aiyar for Kripasankari Ammal and respondents Nos. 2 to 4 appearing in person.

The Court made the following

ORDER :—This is an application made under S. 491 of the Criminal Procedure Code. It is in the nature of an application for *habeas corpus*. The applicant is the mother of the girl who is said to be illegally detained. There was some dispute as regards the age of this girl, and there was conflicting medical testimony on the point. But Mr. A. Krishnaswami Aiyar who appeared for the girl as well as for her step-sister (from whose custody the minor girl was produced) agreed to proceed with the application on the footing that the age of the girl was a little over 17 and under 18. The parties belong to a wealthy Gramani family residing at Kodambakkam

Saraswathi Ammal v. Dhanakoti Ammal.

outside the Municipal limits of Madras. The members of this family have shown themselves extremely litigious and repeated applications have been made before this Court from time to time in regard to disputes that have arisen between them. It is unnecessary to go into these various matters, because the more essential of the facts can be brought within a very small compass. The applicant left the family house or was compelled to leave it about a year or two ago, and the girl has been continuing to live with her step-sister. Arrangements were recently made to give the girl in marriage to her paternal aunt's son who is also a respondent to this motion, and the mother thereupon applied for a writ to Devadoss, J. who was the Vacation Judge and an interim order was made for the production of the minor as well as restraining the marriage. I must mention that the step-sister has shown herself to be a person of very strong will and that the mother, on the other hand, is liable to be easily led away. I have examined the minor herself with a view to ascertain her own wishes in the matter. She is a full-grown girl and is resolute and self-willed. She expressed her wishes very strongly and stated to me that she would not return to her mother and that she was determined to marry the young man to whom her mother objects. The only relevant allegation made against him is that he is not possessed of any property worth mentioning. He is employed as a Proof Reader in the Government Press and gets a pay of about Rs. 25 a month. He looks healthy and strong, and the girl herself, as I have observed, has a decided preference for him.

The short question to be decided is, has a case been made out for the issuing of directions in the nature of *habeas corpus?* It has been repeatedly held in England that the main consideration which ought to weigh with a Court of Chancery is really the question of the welfare of the child. The jurisdiction arises from the power of the Crown delegated to the Court of Chancery and it is essentially a parental jurisdiction, and it is to be exercised for the benefit of the infant. It is also settled law that the word ' welfare ' must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being, and due regard must be had to the ties of affection. With reference to all the circumstances of the case the Court makes an order ; they relate to the position of the parent, the position of the child and the happiness

Saraswathi Ammal v. Dhanakoti Ammal.

of the child. There can be no question that this is the law that is administered by a Court of Chancery in England. The Courts in India act on the same principle, and the Guardians and Wards Act (Act VIII of 1890) recognises that the rules that guide the Court of Chancery are applicable in this country. S. 17 enacts that the Court shall be guided by what appears in the circumstances to be for the welfare of the minor, and where the minor is old enough to form an intelligent preference, it is further enacted that the Court may consider that preference.

A question of law has been raised and as I consider it to be of great importance I proceed to deal with it. The basis of *habeas corpus* is illegal restraint. If the person that is alleged to be illegally detained is an adult, the case presents little difficulty because he appears before the Court and says either that he has been wrongfully detained or that there has been no wrongful detention. But in the case of a minor he cannot be said to be capable of giving consent, and detention against the wishes of a lawful guardian is *prima facie* illegal. The consent to which the Court must thus refer is the consent of the guardian and not that of the infant. If therefore the *de jure* guardian applies for *habeas corpus* in respect of a child detained against his will what are the considerations which must guide the Court in determining the rights of the parties ? I have said that the question of the interests and the welfare of the infant is the dominant question, and the Court must dispose of the application with reference to it. But it is argued by Mr. A. Krishnaswami Aiyar that in the case of a boy over 14 and in the case of a girl over 16 the Court has no option in the matter and that the wishes of the infant must be given effect to. He puts his argument in this way. The application deals with the liberty of a subject. If the infant is of an age to exercise a choice or use a discretion and the infant declares to the Court that he is not in unlawful custody, the Court is bound to make no further order than merely to declare him at liberty; only where the person is too young to be competent to choose, the Court makes an order giving the custody to the lawful guardian. The next step in his argument is, that the right to such an election depends upon age and age alone and not on mental capacity. In support of his proposition he chiefly relies upon *Queen* v. *Howes* (1), *In re*,

(1) 3 El. & E. 332 (121 E. R. 467).

Saraswathi Ammal v. Dhanakoti Ammal.

Andrews (2) and the observations of Brett, M. R. in *In re, Agar Ellis* (3).

In *Queen* v. *Howes* (1) Cockburn, C. J. thus observes :— "The whole question is, what is that age of discretion ? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival of the age of discretion ; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The Legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue ; *and short of which such a child has no discretion to consent to leaving him.*"

The *ratio decidendi* would appear to be applicable to cases arising in India, as corresponding to the English Statutes which fix the age, there is the provision of the Indian Penal Code, S. 363, which makes it penal to entice a minor under 14 years of age if a male or under 16 years of age if a female.

In *In re, Andrews* (2) Archibald, J. makes the following observations :—"The right to such an election, it has been clearly decided, depends upon age alone, and not on mental capacity [see *Reg.* v. *Clarke* (4)] and it may be taken as settled that no such choice can be made, at all events by a female infant under the age of sixteen ; *Rex.* v. *Howes* (5) followed by the Court of Probate and Divorce, in the case of *Cartlidge* v. *Cartlidge* (6) and *Mallinson* v. *Mallinson* (7)." It will be convenient to set out *in extenso* the observations of Brett, M. R. in *In re, Agar-Ellis* (3) which have been strongly relied on.

"It is the universal law of England that if any one person alleges that another is under illegal control by anybody that person, whoever it may be, may apply for a *habeas corpus* and thereupon the person under whose supposed control, or in whose custody, the person is alleged to be illegally and without his consent, is brought before the Court. But the question before the Court upon *habeas corpus* is whether the person is in illegal custody without that person's consent. Now up to

1. 3 Ellis & Ellis 332 (121 E. R. 467). 2. 8 Q B 153.
3. 24 Ch D 317. 4. 7 E & B 186.
5. 3 E & E 332. 6. 2 Sw & Tr 567 : 31 L J (P & M) 85.
7. L R 1 P & M 221.

Saraswathi Ammal v. Dhanakoti Ammal.

a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. Because the Court cannot inquire into every particular case, the law has now fixed upon certain ages, as to boys the age of fourteen and as to girls the age of sixteen, up to which as a general rule the Court will not inquire upon a *habeas corpus*, as between the father and the child as to the consent of the child to the place wherever it may be. But above the age of 14 in the case of a boy, and above the age of 16 in the case of a girl, the Court will inquire whether the child consents to be where it is ; and if the Court finds that the infant no longer a child, but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of an application for a *habeas corpus* falls away. "

With reference to Mr. A. Krishnaswami Aiyar's argument it is necessary to examine whether the passages extracted above express the Law of England correctly on the point. In *Queen* v. *Gyngall* (8) which related to an application for *habeas corpus* in respect of a female infant aged 15, the Court of Appeal refused to give to the mother of the minor custody although she had not been guilty of any misconduct. The child in that case, although she was a female infant under sixteen, was examined and the Court inquired into her wishes. Kay, L. J. refers with approval to *Ex parte Hopkins* (9) which related to three girls, the eldest of whom was only thirteen, whom King, Lord Chancellor questioned to ascertain her own wishes. The observations of Brett, M. R. in *In re, Agar Ellis* (3) to which I referred are set out in the judgment of Kay, L. J. who proceeds thus :—

" This language, of course, had reference to the case of *Reg.* v. *Clarke* (4) in which the application being for *habeas corpus* before the Judicature Act and the child in question being a girl and under sixteen, Lord Campbell, C. J. said that in the course of common law such a child being deemed incapable of consenting he would not inquire into the wishes of the child. I have already shown by reference to the case of *Ex parte Hopkins* (9) that there never was any such rule in the Court of Chancery. " In the same case Lord Esher, M. R. referring to *Reg.* v. *Clarke* (4) says :—" It appears to me

3. 24 Ch D 317.
4. 7 E & B 186.
8. (1893) 2 Q B D 232.
9. 3 P & Wms 151.

Saraswathi Ammal v. Dhanakoti Ammal.

that that ruling was quite correct. That case is no authority for the present where a different jurisdiction comes into play." Both Lord Esher, M. R. and Kay, L. J. refer to the passing of the Judicature Act and clearly lay down that the decisions prior to that Act are not authorities for cases arising after the passing of that Act. If in the light of these remarks one turns again to *In re, Andrews* (2) one cannot fail to notice that the decision rests upon the authority of *Reg.* v. *Clarke* (4) which the Court of Appeal refused to follow in *Queen* v. *Gyngall* (8) on the ground that it was no longer applicable after the passing of the Judicature Act. Kay, L. J. refers in this connection to a child being of a reasonable age and says that the Court would hardly then desire to determine the question without seeing and speaking to the child and ascertaining its wishes on the matter. This expression of opinion is hardly consistent with what Cockburn, C. J. said in regard to intellectual precocity of any particular individual.

The subject is considered again in *In re, Harriet O'Hara* (10). Fitz-Gibbon, L. J. summarises the principles deducible from the judgments of Lord Esher and Kay, L. J. in *Gyngall's case* (8) and repudiates the suggestion that the girl in question there ought not to have been consulted because she was only 11 years of age. He thus observes :—" I entirely dissent from this contention. From the time of King Chancellor in *Ex parte Hopkins* (9) the Court of Chancery has exercised its discretion in seeing the young children not for the purpose of obtaining their consent but for the purpose and as one of the best modes of determining what is really for their welfare though the Common Law Courts as a general rule would not inquire as between parent and child as to the child's consent below the age of 14 for a boy or 16 for a girl."

I think I have made it fairly clear that the hard and fast rule which Mr. Krishnaswami Aiyar asks me to accept does not obtain at the present day in England. I have been referred by Mr. Krishnaswami Aiyar also to Simpson on *Infants*, 3rd Edn., page 188 and Short and Mellor's *Practice of the Crown Office*, 2nd Edn., page 313. But the learned authors

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2. 8 Q B 153.
4. 7 E & B 186.
8. (1893) 2 Q B D 232.
9. 3 P & Wms 151.
10. (1900) 2 I R 232.

rely upon cases decided before the passing of the Judicature Act and I cannot therefore act upon the passages to which my attention has been drawn.

In each case the Court must decide with reference to the interests and the welfare of the minor. If an infant capable of forming an intelligent opinion expresses its views, the Court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important element and the degree of the child's mental development must to a certain extent weigh with the Judge in deciding how far its wishes shall be given effect to. In the same way, the age of the child is also an important factor. It seems to me that the rule that fixes an inflexible limit in regard to age is too artificial and even if the contention is correct (which in my opinion is not) that such a rule obtains in England, I am emphatically of opinion that there is no warrant for the extension of the doctrine to India where different considerations may apply and different conditions do prevail.

In *Pollard* v. *Rouse* (11) Wallis, J. (as he then was) thus observes at page 293 :—" Lastly it is well established that the Court will not ordinarily force a minor of more than 14 if a boy, and of more than 16, if a girl, to remain in custody to which he or she objects. " It is urged by Mr. Krishnaswami Aiyar that Wallis, J. by qualifying his statement by the use of the word " ordinarily " has failed to correctly set forth the effect of the English decisions. It is doubtful whether Wallis, J. brought his mind to bear upon this particular aspect of the question because at page 298 there occurs in his judgment the following passage inconsistent with his earlier observation :—" As regards the girls over 16 and boys over 14 it is now conceded in accordance with the principles I have explained that the Court cannot in the present case force them to return to the plaintiff against their will. " It seems to me that this case cannot be of much value as an authority upon this particular point.

In *In re, Saithri* (12), a minor, Baguley, J. points out in a judgment which refers to various authorities that it is not right to apply the very artificial rule to which reference has been made.

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11. (1910) I L R 33 M 288. 12. (1891) I L R 16 Bom 307.

Saraswathi Ammal v. Dhanakoti Ammal.

I have therefore looked at the question purely from the point of view of the welfare of the minor. I have paid necessarily, as any Court will pay, great attention to the expressed wishes of the infant who will soon reach the age of 18, the age of majority. She is in a position to decide for herself and she expresses a decided preference to remain in the custody from which she has been produced. She is able to form a judgment as to what is in her own interest and for her benefit. She has freely chosen to give her hand in marriage to her paternal aunt's son. It is also not impossible that she has been on terms of friendship and familiarity with this young man and it is not desirable to take her away from the surroundings to which she has been accustomed and to place her in the custody, against her will, of her mother who is a woman not of strong will and easily capable of being influenced by the person who at the time happens to be nearest to her ; and it is necessary and important to bear in mind that the mother is not being deprived of the custody of the infant but on the contrary I am asked to take the child away from the custody which she prefers and place her in the custody of the mother to whom she expresses a positive dislike.

The order that I propose to make therefore is that she be freed from all restraint and be at liberty to go where she chooses.

In the circumstances of the case I make no order as to costs.

A. S. V. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KUMARASWAMI SASTRI.

Mollaya Padayachi and another *Appellants* (4th and 5th defendants)*

v.

Krishnaswami Iyer and others *Respondents (Plaintiff and defendants Nos.* 1, 3 *and* 8, 10.)

Mollaya Padayachi v. Krishnaswami Iyer.

Benami—*Test of—Purchase by husband in the name of his wife—No presumption of advancement—Persons dealing with* benamidar—*Notice of real title—Mortgage by* benamidars—*Money applied for averting sale of property in execution of decree against the real owner—Rights of mortgagee.*

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*Appeal No. 73 of 1921. 29th February, 1924.

Mollaya Padayachi v. Krishnaswami Iyer.

Where a Hindu having two wives and children by both of them invests the bulk of his savings in the purchase of immoveable property in the name of one of his wives, the wife is merely a *benamidar* for him and there is no presumption of advancement. *Kerwick* v. *Kerwick*, I L R 48 C 260 (P C) relied on.

Where subsequent to the acquisition of the property, both the husband and wife dealt with it jointly and the husband was also occupying a house forming part of the acquisition and there were disputes in Court where the husband asserted his exclusive title to the acquisition, a person who, having notice of these facts takes a mortgage of the property from the wife or her son as her legal representative without reference to the husband and without enquiry into the real state of the title, is not protected by S. 41 of the Transfer of Property Act. But where a portion of the money advanced by the mortgagee was deposited in Court under O. 21, R. 89, Civil Procedure Code, to prevent the confirmation of a sale of the property held in execution of a joint decree obtained against the husband, the wife, and their son, the mortgagee is to that extent entitled to a charge on the property as against the husband, the real owner and persons claiming title under him.

Bhagwan Singh v. *Nazar Ali Khan*, I L R 36 A 272, 276 ; *Narayana Kutti Goundan* v. *Pachammal*, I L R 36 M 426 ; and *Gopala Aiyangar* v. *Mammachi Reddiar*, 17 L W 254 referred to.

Per Kumaraswami Sastri, J.—Where property is sold in execution of a decree against the real owner and the *benamidar* raises money for the purpose of setting aside the sale, it is contrary to all equitable principles to hold that the real owner who took no steps to avert the sale could step in afterwards and claim the property free from any obligation to repay the money borrowed by the *benamidar* for setting aside the sale.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in O. S. No. 21 of 1918 dated 17th November 1920.

T. Rangachariar and *V N. Venkatavaradachariar* for appellants.

K. Bhashyam Aiyangar, A. Srirangachari, P. J. Kuppanna Rao and S. Nagaraja Aiyar for respondents.

The Court delivered the following

JUDGMENTS :—*Kumaraswami Sastri, J.*—The 4th and 5th defendants are the appellants.

Kumaraswami Sastri, J.

The plaintiff sued to recover Rs. 6,669-1-0 with costs and further interest due on a deed of mortgage dated the 27th of January, 1916 executed by the 1st defendant in his favour for Rs. 5,500 with interest at 9 per cent. per annum. It is alleged that the amount was repayable within the 27th of January, 1917, and that, in default of payment, interest at 12 per cent.

Mollaya Padayachi v. Krishna-swami Iyer.

Kumara-swami Sastri, J.

was chargeable from the date of the bond and was to be added to the principal with annual rests.

The 1st defendant is the son of the 2nd defendant. The case for the plaintiff is that the mortgaged properties belong to Murugayee, the mother of the 1st defendant and the wife of the 2nd defendant, that Murugayee who died on the 7th January, 1916, executed a will, dated the 2nd of April, 1914, whereby she bequeathed the properties to the 1st defendant, that the 1st defendant became the exclusive owner of the properties, that in execution of the decree in O. S. No. 55 of 1914 on the file of the Tanjore Additional Sub-Court, which was passed against the 1st and 2nd defendants and the deceased Murugayee in favour of Dandapani Vaithiyan the properties were brought to sale and purchased by the decree-holder on the 20th of January, 1916, that with a view to set aside the sale, the 1st defendant who was the owner of the properties which were sold, executed the plaint mortgage deed, that the amount advanced by the plaintiff was deposited in Court by the 1st defendant towards the amount due under the decree and the Court sale was set aside on the 1st of February, 1916, and that the money advanced on the suit mortgage thus satisfied the decree of Court against the 2nd defendant also and went to set aside the Court sale. The plaintiff states that the 2nd defendant has no interest in the mortgaged properties, that in case the 2nd defendant claims the mortgaged properties as joint properties, the mortgage is binding on him as the 1st defendant was acting as the manager of the family and borrowed the money for preserving the estate and for satisfying the decree against the 2nd defendant, that in any event the 2nd defendant was bound in law to reimburse the plaintiff to the extent to which he, the 2nd defendant was benefited by the amount advanced for the mortgage and that he is liable to pay the plaintiff half the amount deposited in O. S. No. 55 of 1914, as the decree was personally against the 2nd defendant, and his wife Murugayee and against the family properties of the 1st defendant.

The 3rd defendant was made a party as he is a subsequent purchaser from the 1st defendant. Defendants 4 to 8 were made parties as mortgagees and purchasers from the 2nd defendant. Defendants 9 and 10 were made parties as they are the sisters of the 1st defendant and live in the first item of the mortgaged properties with the plaintiffs' permission.

The 1st defendant filed a written statement admitting the plaintiff's claim and the allegations in the plaint.

The 2nd defendant filed a written statement denying that the properties belonged to his wife, Murugayee, and denying her right to dispose of the properties by will. He states that she had no funds to purchase the properties, that he went to the Transvaal, stayed there for several years, earned money and remitted money by post and brought money with him whenever he came to India, that the properties were purchased with his own funds *benami* in the name of his wife and were his exclusive properties and that the plaintiff was well aware that the properties stood in Murugayee's name only *benami* and that he was the real owner. He admits that a decree was passed in O. S. No. 55 of 1914 on the file of the Additional Sub-Court, Tanjore, against himself, his wife Murugayee and his son, the 1st defendant, and the suit properties were brought to sale and that a sum of Rs. 4,203-1-4 was paid for setting aside the sale. He states that in any event there was no consideration for the suit mortgage to the extent of Rs. 1,500. He denies that the properties are the joint properties of himself and his son and states that he is the exclusive owner of the properties and has been managing the same. He denies that he is bound by the mortgage as the 1st defendant was only a volunteer and paid the money to set aside the sale, alleging title hostile to the real owner. He states that he sold items 2 to 18 for a proper consideration to the 6th defendant, that the 4th defendant purchased those items from the 6th defendant and that the first item was mortgaged by him to the 6th defendant who assigned the mortgage to the 5th defendant. He attacks the sale of the suit properties to the 3rd defendant by the 1st defendant as fraudulent. The 3rd defendant filed a written statement pleading that as he is not in possession of the suit properties he has not paid the amount due on the mortgage to the plaintiff and that he should not be made liable for costs.

Defendants 4 and 5 adopt the written statement of the 2nd defendant. The 6th defendant died pending suit and the 11th and 12th defendants were added as his legal representatives. The 11th defendant filed a written statement stating that he is an unnecessary party to the suit, that he is

Mollaya Padayachi v. Krishna-swami Iyer.
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Kumara-swami Sastri, J.

not the legal representative of the 6th defendant and is not in possession of any assets, that Lakshmanan Chetti, the 12th defendant, is the legal representative of the 6th defendant, that the 6th defendant died even before the suit and that the suit is not maintainable against him.

The Subordinate Judge, while disbelieving the case that the deceased Murugayee had funds of her own and that the suit properties were purchased out of such funds, held, that the 2nd defendant, her husband, purchased the properties with his own funds but for the benefit of his wife, Murugayee and not *benami* in her name, that there was nothing to show that the plaintiff was aware that Murugayee was a *benamidar* and that the 2nd defendant was estopped from setting up the rights of a real owner against the plaintiff. He also held, that apart from any question of the purchase being *benami* or of estoppel, the mortgage was enforceable against the 2nd defendant on the principle of salvage lien and passed the usual mortgage decree in favour of the plaintiff as prayed.

Against this decree the 4th and 5th defendants appeal. Their contention is that the evidence shows clearly that the properties were purchased by the 2nd defendant in the name of his wife Murugayee, that the plaintiff was fully aware of the *benami* nature of the purchase, that the 1st defendant executed the mortgage alleging title hostile to the 2nd defendant his father, and claiming the properties mortgaged as his absolute properties vested in him as legatee under the will of his mother, Murugayee, who was the absolute owner and that even though a portion of the mortgage money went to set aside the Court sale, the mortgage would not bind the 2nd defendant or his transferees, the 4th and 5th defendants, as the suit mortgage was executed by the 1st defendant alleging title hostile to the 2nd defendant and without his consent.

The main questions for determination are whether the purchase of the suit properties by the 2nd defendant was *benami* in the name of his wife Murugayee, whether the plaintiff had notice of the *benami* nature of the transaction, whether the mortgage is binding on the 2nd and the 4th and 5th defendants to the extent to which the mortgage amount went to discharge the amount of the decree in execution of which the properties were sold and whether, if the mortgage is not binding, the plaintiff is entitled to a charge to that extent ?

It is admitted that the 2nd defendant was not possessed of any ancestral properties. The evidence shows that he was a barber by caste and went to South Africa at least on three occasions. He made money there and either brought money when he visited India or sent money from South Africa to India. The properties purchased by him consisted of 13 3|4 cawnies. Excepting three-fourths of a cawny which he purchased in the name of himself and another wife of his, Meenakshi, the remaining lands were purchased in the name of Murugayee.

The case for the plaintiff and the 1st defendant is that Murugayee got moneys from her mother, but the evidence which is unreliable has been rightly discredited by the Subordinate Judge. He finds, and I think, rightly on the evidence that the consideration for all the purchases came from the 2nd defendant and that the moneys were both brought and sent by him from the Transvaal.

[His Lordship then considers the evidence in the case.]

These are all the documents connected with the plaint properties, and it is clear that almost all the documents are executed by Murugayee and attested by her husband, the 2nd defendant, or executed by both the 2nd defendant and Murugayee. It is also clear from the evidence that the money for the purchase of the properties was supplied by the 2nd defendant and that where they had to borrow money either for purchasing properties or for family expenses, it was the 2nd defendant that discharged the debts. There is no evidence worth the name to show that Murugayee was ever in a position either to purchase properties or to pay the loans which were raised upon the properties.

Stress was laid down on the fact that the documents recite that the properties belong to Murugayee but where the purchase is *benami* and moneys have to be raised, the person who lends money would require a recital as to ownership and it is the invariable practice in such cases to get the attestation of the real owner so that if any question should arise subsequently, he may be bound by the attestation. It is the common belief that attestation by the husband or near relation of the executant is evidence of his consent and will bind him ; and parties hardly realise the effect of the recent decision of

Mollaya Padayachi v. Krishnaswami Iyer.

Kumaraswami Sastri, J.

the Privy Council that attestation does not by itself import consent to or knowledge of the contents of the document.

It is clear that the source of purchase money is a very important criterion for determining the real ownership. In *Gopeekristo Gosain* v. *Gangapersad Gosain* (1) it was held by their Lordships of the Privy Council that the test is as to who advanced the purchase money and that there is no presumption of advancement where property is purchased by a father in the name of his son. In *Moulvie Sayyud Uzhur Ali* v. *Musammat Bebee Ultaf Fatima* (2) it was held that the principle of *benami* laid down in *Gopeekristo Gosain* v. *Gangapersad Gosain* (1) applies equally to Mahomedans and that there is no presumption of advancement by the name of the son being used as purchaser. Their Lordships at page 247 observe, " that the criterion of these cases in India is to consider from what source the purchase money comes ; that the presumption is that a purchase made with the money of *A*, in the name of *B*, is for the benefit of *A* ; and that from the purchase by a father, whether Mahomedan or Hindu, in the name of his son, you are not at liberty to draw the presumption, which the English Law would draw of an advancement in favour of that son. Again, the mere fact that this property was purchased, not in the sole name of the son but in the name of the wife as well as of the son affords a strong argument in favour of the hypothesis that it was a *benami* purchase for there was no such community of interest between the wife and the son as would render it probable that they had been made joint owners of the property and the reason for putting two names rather than one into a trust applies almost as strongly in India as it would in this country."

There being no presumption of advancement, the onus lies on the respondents to show that in purchasing the properties in the name of Murugayee, the 2nd defendant intended that it should be for her benefit. As I have already pointed out, out of the 13 3|4 cawnies only three-fourths of a cawny was purchased by the 2nd defendant in the name of himself and his second wife Meenakshi and the balance of 13 cawnies were purchased in the name of his first wife Murugayee. He was thus practically without any property, and this circumstance, I think, strongly militates against the view that the

1. (1854) 6 M I A 53. 2. (1869) 13 M I A 232.

Mollava Padayachi v. Krishna-swami Iyer.

Kumara-swami Sastri, J.

purchase was for her benefit. It is hardly likely that a man in the position of the 2nd defendant would have denuded himself of all his properties with the idea of benefiting his first wife at the expense of himself, his second wife, his first wife's son and his second wife's children. I may in this connection refer to the observations of their Lordships of the Privy Council in *Kerwick* v. *Kerwick* (3). After noting the fact that all the properties were in the name of the wife, their Lordships observe "If he had been possessed of an uncontrollable passion to bestow upon his wife beneficially every fragment of property he could acquire, to leave himself with nothing to live upon but his salary and at the same time be burdened with debt and his children being absolutely unprovided for, he could not have gratified that passion more fully than he apparently did if his wife's case be true." Their Lordships think that it is impossible to draw a presumption of advancement where almost all the property was purchased in the name of the wife. This is the view taken in cases between Englishmen where the presumption of advancement prevails and it applies *a fortiori* to cases of Hindus where there is no such presumption.

I find it difficult to agree with the Subordinate Judge when he states that the suit properties were purchased by the 2nd defendant for the benefit of his wife and I have no hesitation in coming to the conclusion that the properties were purchased by the 2nd defendant *benami* in the name of his wife and that she had no interest in them.

On the 13th of March, 1913 the 2nd defendant and his wife Murugayee executed a promissory note (Ex. 8) for Rs. 600 in favour of Sundarappier. The consideration is said to have been received for the purpose of paying the amount of the absolute sale deed obtained on the 12th of March, 1913 from one Velayudha Mudali in favour of Murugayee and for domestic purposes. Another promissory note, Ex. 8 (*a*), dated the 7th of April, 1913 was executed by the 2nd defendant and his wife for Rs. 1000 in favour of Sundaram Iyer. The object is said to be for paying the amount of the sale deed got on the 3rd of April, 1913 from one Kandasami Mudaliar in favour of Murugayee and for the purpose of meeting certain repairing charges.

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3. (1920) I L R 48 C 260 : 39 M L J 296 (P C).

Mollaya Padayachi v. Krishnaswami Iyer.

Kumaraswami Sastri, J.

The 3rd defendant in this suit is the son of Sundarappier and he was appointed by the plaintiff's father as guardian of plaintiff and executor of his will. The 3rd defendant's father Sundarappier filed O. S. No. 184 of 1914 on the file of the District Munsif's Court of Chidambaram on Exs. 8 and 8 (*a*) praying for a personal decree against the 2nd defendant Murugayee and against the 1st defendant to the extent of the family properties and he got an attachment before judgment of the properties now in dispute.

The 2nd defendant and his wife Murugayee executed a promissory note for Rs. 3,434 on the 7th of October, 1911 in favour of one Dandapani Vaidiar who filed O. S. No. 48 of 1914 on the file of the Court of the Subordinate Judge of Mayavaram which was transferred to the file of the Temporary Subordinate Judge of Tanjore and numbered there as O. S. No. 55 of 1914 to recover Rs. 4,439-9-0 the principal and interest due under the promissory note. He prayed for a personal decree against Murugayee and her husband the 2nd defendant herein and the 1st defendant, their son, was made a party in order to bind the joint family properties. He applied for attachment before judgment. A decree (Ex. P) was passed on the 22nd of February, 1915 for Rs. 4,271-2-0 with costs and further interest against the 2nd defendant herein and Murugayee personally and against the 1st defendant to the extent of the joint family properties. Execution was applied for by Dandapani Vaidiar and the sale of the properties was fixed for the 20th of January, 1916. The 2nd defendant herein who was the 1st defendant in that suit filed an application (Ex. Z) under O. 21, R. 83, Civil Procedure Code, praying for a postponement of the sale for six months and for leave to effect a private sale or to mortgage the properties. It was alleged in the affidavit (Ex. Z1), that his wife was dead, that the properties were purchased by him *benami* in her name, that there were misunderstandings between himself and his wife and that he was therefore not able to raise money to discharge the debts. On the 20th of January, 1916, the petition was dismissed as it was not pressed. The properties were brought to sale and sold. The 1st defendant in this suit applied under O. 21, R. 89, Civil Procedure Code, to set aside the sale and paid into Court a sum of Rs. 4,256-15-4 being the balance of the amount due under the decree and the five per cent. of the purchase money payable to the purchaser. The application

Mollaya Padayachi v Krishnaswami Iyer.

Kumaraswami Sastri, J.

is Ex. AA. The affidavit in support of the application is Ex. AA1. It was filed by the 1st defendant herein who was the 3rd defendant in that suit and he stated that his mother, the 2nd defendant in that suit died, that the properties which belonged to him and his mother were sold in Court auction on the 20th of January, 1916, and the plaintiff himself purchased the moveable and immoveable properties and that he had paid the balance due and the five per cent. of the purchase money and wanted the sale to be set aside. The 2nd defendant herein after his application (Ex. Z) was dismissed, did nothing. The amount paid into Court to set aside the sale under O. 21, R. 89, was borrowed from the plaintiff in this suit under Ex. A executed by the 1st defendant herein. The mortgage deed recites that the properties belonged to his mother Murugayee who purchased and enjoyed them, that he is now in possession and enjoyment of the same and that he has borrowed Rs. 5,500 for the purpose of getting back the properties which had been sold in execution of Dandapani Pandithan's decree. The Subordinate Judge finds that out of the mortgage money borrowed from the plaintiff a sum of Rs. 4,629-11-4 was paid into Court to get back the properties as appears from Ex. AA3, and states that the properties which were worth Rs. 12,000 or 13,000 were sold in execution of Dandapani's decree and were purchased by Dandapani himself for less than one-fourth of their market value.

Sundarappier applied to execute his decree and to bring the properties to sale which had already been sold in execution of Dandapani's decree. The 1st defendant herein filed Ex. 9 objecting to the sale in execution and stated that the immoveable properties under attachment belonged to his mother, that he got them from her by a will, that the 2nd defendant herein who was the 1st defendant in that suit had no right to those properties, that they had been sold in execution of the decree in O. S. No. 55 of 1914, that he borrowed Rs. 5,500 and executed a mortgage of the properties on the 27th of January, 1916, that out of the sum borrowed Rs. 4,629-11-4 was paid into Court to set aside that sale and that the properties should be sold subject to that mortgage. Ex. 3 is the sale proclamation in O. S. No. 184 of 1914 and it states that there was a mortgage over the properties, dated the 27th of January, 1916, for Rs. 5,500 in favour of Krishnaswami Iyer but that it was subsequent to the attachment before judgment. It appears from

Mollaya Padayachi v Krishnaswami Iyer. — Kumaraswami Sastri, J.

Ex. IV that on the 16th of September, 1916, items 1 to 17 of the sale proclamation were sold to the plaintiff's vakil in that suit for Rs. 1,012. It appears from Ex. V that the 2nd defendant herein applied to adjourn the sale on the ground that he had arranged to raise money elsewhere but that the 3rd defendant therein who is the present 1st defendant was unwilling to join in the petition and the petition was dismissed and the properties were brought to sale.

On the 12th of October, 1916 the present 2nd defendant agreed to sell the properties to Sevagan Chetty, the deceased 6th defendant herein. Ex. I (*a*), dated the 12th of October, 1916, recites that the properties were purchased by him *benami* in the name of his wife, Murugayee, that the properties were sold in execution of the decree in O. S. No. 184 of 1914 and that he received Rs. 2,400 for the purpose of setting aside the sale. It appears from Ex. II that a sum of Rs. 2,348-0-2 was paid into Court and that the sale was set aside on the 17th of October, 1916.

The question therefore arises as to how far on these facts the mortgage in favour of the plaintiff is binding on the 5th and 6th defendants and the first question I have to consider is whether the plaintiff Krishnaswami Iyer is a *bona fide* mortgagee from the 1st defendant without notice of the fact that the 1st defendant's mother was only a *benamidar*. The Subordinate Judge finds that the will, Ex. Y, dated the 2nd of April, 1914, executed by the 1st defendant's mother, was genuine and valid so that if the properties belonged to Murugayee or if the plaintiff had advanced the money *bona fide* without knowledge that Murugayee was only a *benamidar* he would be protected under S. 41 of the Transfer of Property Act. I have already given my reason for holding that Murugayee was only a *benamidar*.

The next question is whether the plaintiff is a *bona fide* lender without notice. I do not think that the plaintiff is protected under S. 41 of the Transfer of Property Act. I think the evidence shows that the plaintiff must have been aware of the fact that Murugayee could not be the real owner of the properties. Murugayee, her husband and their children were all living in the house which is one of the items mortgaged to him. The plaintiff in his evidence admits that he knows the 1st and 2nd defendants and that the 1st defendant is the son of the 2nd defendant and that the 2nd defendant had

money dealings with him. He admits that in 1914 he got a transfer of the decree in O. S. No. 98 of 1910 on the file of the Shiyali District Munsif's Court in 2nd defendant's favour which had been attached by Dandapani in O. S. No. 55 of 1914. Though he says that he does not remember it, it is clear from Ex. XXI (*a*) that he filed a claim and that it was dismissed. He says that when he took Ex. A, though he knew of the existence of the 2nd defendant he did not make any enquiries of him. He also states that he knew that the 3rd defendant's father had attached the properties at the time of his mortgage Ex. A, and that he saw all the deeds of sale and mortgage in respect of the properties at the time of the mortgage Ex. A. It is therefore clear that the fact that some of the deeds were jointly executed by Murugayee and her husband, the 2nd defendant, and that her husband attested almost all the documents, must have put the plaintiff on notice, and the absence of any enquiry by him from the 2nd defendant who was living in one of the houses mortgaged shows that the plaintiff had constructive notice, because, if he had pursued the matter further and made enquiries from the 2nd defendant he would have been told all the facts. It is also clear that he had notice both of Dandapani's suit and of Sundarappier's suit. He says that he paid the money under Ex. A to set aside the Court sale. If he had made enquiries he would have known that there were disputes between the father and the son as regards the title to the properties. It is clear from the evidence of the plaintiff's 7th witness, Subbarama Aiyar, who admittedly negotiated the mortgage, Ex. A, that he must have known that the 2nd defendant was asserting that he was the real owner. He admits that he was the writer of Ex. XV, dated the 27th of January, 1914, where it is distinctly stated that the properties mortgaged were purchased by the 2nd defendant *benami* in the name of his wife Murugayee. Plaintiff's 8th witness, Ramachandra Aiyar (3rd defendant), admits that he was an executor appointed under the plaintiff's father's will and that he knew the 2nd defendant from 1912. He states that he did not know Murugayee before Ex. XII and how she acquired the properties. I find it difficult on the evidence to hold that the plaintiff when he lent the money for the purpose of paying it into Court to set aside the sale in execution of Dandapani's decree was ignorant of all that had happened before and lent the money *bona fide* believing that Muru-

Mollaya Padayachi v. Krishnaswami Iyer.

Kumaraswami Sastri, J.

gayee was the real owner and that her husband, the 2nd defendant, had or claimed no interest in the properties.

The question remains as to the relief if any to which the plaintiff is entitled on these facts. There can be little doubt on the evidence that the properties mortgaged were sold in execution of a decree to which the 1st and 2nd defendants were parties and that but for the act of the 1st defendant in raising money from the plaintiff and setting aside the Court sale under O. 21, R. 89, Civil Procedure Code, the properties would have been lost to the 2nd defendant who on the evidence is the real owner of the properties. The 2nd defendant wanted an order postponing the sale and permission to raise moneys to pay off the decree amount but his application was dismissed as the 1st defendant did not concur. He then did nothing and the 1st defendant claiming to be the real owner of the properties applied to set aside the sale under O. 21, R. 89, Civil Procedure Code, and paid the amount due under the decree into Court. The result has been that not only has the liability of the 2nd defendant under the decree been satisfied but the 2nd defendant and the transferees from him are now in a position to put forward their claim to the properties on the ground that Murugayee, the mother of the 1st defendant, was only a *benamidar*.

Reliance was placed by the respondents' vakil on Ss. 69 and 70 of the Contract Act but these sections would not apply. It is clear that the payment into Court under O. 21, R. 89 by the 1st defendant was not made for the 2nd defendant but was made in the assertion of a hostile title and for the protection of the interest of the person making the payment. The mere fact that the 2nd defendant was benefited will not be sufficient.

In *Ram Tuhul Singh* v. *Biseswar Lal Sahoo* (4) their Lordships of the Privy Council observe "The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt. Still less will the action lie when the money has been paid against the will of the party for whose use it is supposed to have been paid." It is thus clear that where a person makes a payment in the assertion of a hostile title and for the protection of his own

4. (1875) L R 2 I A 131.

Mollaya Padayachi v. Krishnaswami Iyer. — Kumaraswami Sastri, J.

interests, in order to save property which he claims to be his from passing out of his hands, the mere fact that the other party is benefited will not, if it is found that the person making the payment has no title, entitle him to be reimbursed. In *Veeraraghava Iyer* v. *Lakshmana Iyer* (5) it was held that the interest contemplated by S. 69 of the Indian Contract Act is an existing interest which the payment is intended to protect and not an interest which is created by the payment itself, that S. 70 of the Indian Contract Act has no application where the person making the payment makes it for himself and not for the person against whom the claim for reimbursement is made and that S. 101 of the Transfer of Property Act does not create a security where there was no security before. In *Sri Sri Sri Chandra Deo* v. *Srinivasacharlu* (6) it was held that the test to bring the case under S. 70 of the Indian Contract Act is that a person should have in fact enjoyed the benefit by accepting or adopting without objecting to it and that it is not necessary that before the act is done by the other party an option must have been given to the persons sought to be made liable, of accepting or declining the benefit before the benefit is given. All the authorities on the subject have been reviewed by the learned Judges. The scope of S. 70 was also considered in *Gopala Aiyangar* v. *Mummachi Reddiar* (7). In that case the plaintiff sued to recover moneys paid by him for discharging encumbrances on certain properties purchased by him. The sale to the plaintiff was held not to be binding and was set aside against the defendants in the previous proceedings. Spencer, J., after a review of the authorities, held that the plaintiff was entitled to recover under Ss. 69 and 70 of the Indian Contract Act moneys paid by him for discharging encumbrances but that he was not entitled to a charge for the same. Devadoss, J. held that the plaintiff was not entitled to recover, as he was a mere speculating volunteer and as he was aware that the sale to him conveyed no title. I agree with the view taken by Spencer, J., but it will not help the plaintiff in the present case. Unless there is a charge in his favour he would have no relief against the 5th and 6th defendants who are purchasers from the 2nd defendant.

The 1st defendant may have a claim for contribution as the decree was a joint decree but this again will give him no

5. (1912) 25 M L J 312. 6. (1913) I L R 38 M. 235 : 25 M L J 433.
7. (1922) 17 L W 254.

Mollaya Padayachi v. Krishnaswami Iyer. — Kumaraswami Sastri, J.

charge. If Ss. 69 and 70 do not apply, the mere fact that a person setting up a hostile title discharges encumbrances which the other party was liable to discharge would of itself give no right. In *Ammani Ammal* v. *Ramaswami Naidu* (8) it was held that where the guardian of a minor purports to sell the minor's property as the guardian's own property the mere fact that part of the consideration for the sale went to discharge debts binding on the minor would not cast on him an obligation of repaying the debts found to be binding on him and discharged out of the purchase money. In *Balwant Singh* v. *R. Clancy* (9) it was held that where a person who was the manager of an undivided family mortgaged property as if he was the full owner denying the right of the junior members of the family, the alienee cannot claim to be paid back the portion of the mortgage money which went to discharge the debts binding on the junior members of the family.

Reference has been made by Mr. Bhashyam Aiyangar for the respondents to *Bhagwati Prasad* v. *Radha Kishen Sewak Pande* (10) where their Lordships of the Privy Council held that where a person lent money to the nominal purchaser of a property who was the agent of the real purchaser in order to purchase the property, there was a charge on the purchase money so advanced. This decision was considered in *Royzuddi Sheik* v. *Kali Nath Mookerjee* (11) and it was held that where a person who held a tenure *benami* for another executed a bond in favour of the landlord, who knew that the person executing the bond was only a *benamidar*, for arrears of rent, it would not affect the tenure and that the landlord suing on the bond was not entitled to claim a charge on the land under the Bengal Tenancy Act. The learned Judges distinguish this case on the ground that there were no such equitable considerations in this case as those that arose in *Bhagwati Prasad* v. *Radha Kishen Sewak Pande* (10).

The facts of the present case, however, can be distinguished from the cases I have referred to and in my opinion entitle the plaintiff to a charge for the sum which went to set aside the sale under O. 21, R. 89. The decree was a joint decree against the 1st and 2nd defendants and the deceased Murugayee. It was on a promissory note executed by the 2nd defendant, the real owner and Murugayee, the *benamidar*.

8. (1918) 37 M L J 113. 9. (1912) I L R 34 A 296.
10. (1893) I L R 15 A 304 (P C). 11. (1906) I L R 33 C 985.

Mollaya Padayachi v. Krishnaswami Iyer.
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Kumaraswami Sastri, J.

The sale was a sale that will bind both the real owner and the *benamidar*, and if the sale was not set aside, the title of the real owner would have been extinguished because the judgment-debtors were the *benamidar* and the real owner and whether the properties belonged to him or were Murugayee the purchaser would have got an absolutely good title.

It is clear that under the Civil Procedure Code of 1908 title vests in the auction purchaser from the moment of sale and that no confirmation is necessary. I need only refer to the decision of the Privy Council in *Bhawani Kuar* v. *Mathura Prasad Singh* (12) where it was held that a sale in execution took effect from the actual date of the sale and not from the date of confirmation. A similar view was taken by a Full Bench of this Court in *Venkatachellamayya* v. *Nilakanta Girjee* (13).

As, therefore, title passed out of the real owner and the *benamidar* at the Court sale, the setting aside of that Court sale by the 1st defendant by payment of money into Court must be treated as a re-purchase by the 1st defendant and the mortgage to the plaintiff in so far as the consideration went to set aside the sale must be treated as money borrowed to re-purchase the properties. In *Mallireddi Ayyareddi* v. *Adusmili Gopalakrishnayya* (14) their Lordships of the Privy Council treated money paid by a puisne encumbrancer to discharge a mortgage and to stave off proceedings being taken to bring the mortgaged properties to sale, as purchase money. It is also clear that a *benamidar* is an agent or trustee for the real owner. In *Choudhri Gur Narayan* v. *Sheo Lal Singh* (15) it was held that a *benamidar* represents the real owner and so far as their relative legal position is concerned, is in the position of a mere trustee for him. Their Lordships of the Privy Council observe:—" As already observed, the *benamidar* has no beneficial interest in the property or business that stands in his name ; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. "

In the present case the properties were sold in execution of the decree against the real owner and the *benamidar* and there was no misconduct or default by the *benamidar* which led

12. (1912) I L R 40 C 89 (P C).
13. (1917) I L R 41 M 474 : 34 M L J 156 (F B).
14. (1923) I L R 47 M 190 : 46 M L J 164 (P C).
15. (1918) 36 M L J 68 (P C).

Mollaya Padayachi v. Krishnaswami Iyer.

Kumaraswami Sastri, J.

to the sale. It seems to me that where a person in the position of an agent or trustee repudiates his character and re-purchases properties in his own name, it is open to the real owner to treat such repudiation as a nullity and to claim that the properties are held by the *benamidar* in trust for him and the *benamidar* cannot treat the re-purchase as for his own benefit. But at the same time I can find no authority for holding that the real owner can get the properties free from the obligation to pay the money that was the consideration for the re-purchase. S. 62 of the Trusts Act which deals with wrongful purchase by a trustee states that the beneficiary if he wants to have the property so purchased declared subject to the trust or re-transferred by the trustee should repay the purchase money paid by the trustee with interest. S. 90 which deals with advantages gained by a qualified owner similarly makes the holding of the advantage to be for the benefit of the other party but subject to repayment of expenses properly incurred. It is obvious that but for the raising of the money on the mortgage to the plaintiff the properties would have been legally and effectively lost to the real owner. Applying therefore the law as regards purchase by agents or trustees of property which the principal or *cestui que* trust can claim the advantage of, no case has been referred to us which decides that because the re-purchase was made by the agent or trustee in his own name, it passed free of any obligation created on the property for the purpose of meeting the purchase money in cases where the original sale was not brought about by any default of the agent or trustee and would be binding on the *cestui que* trust.

Where property is sold in execution of a decree against the real owner and the *benamidar* re-purchases the property or raises money for the purpose of setting aside the sale, it seems to me to be contrary to all principles of equity and justice to hold that the real owner who took no steps to discharge the decree and who allowed the property to be sold could step in and claim the property free from any obligations to repay the money borrowed by the *benamidar* for the purpose of setting aside the sale. In the present case it is clear that the sale proclamation in the decree to pay off which the 2nd defendant alienated the properties to the 5th and 6th defendants distinctly states that the Court sale was subject to the mortgage in favour of the plaintiff and any enquiry which the 5th

Mollaya Padayachi v. Krishnaswami Iyer.

Kumaraswami Sastri, J.

and 6th defendants ought to have made would have shown that the mortgage to the plaintiff was to set aside the sale under O. 21, R. 89 in the other suit. But even if they had no notice, it is clear from *Srinivasaraghava Aiyangar* v. *Ranganatha Aiyangar* (16) that where there is a charge on immoveable property, a purchaser of the immoveable property, although without notice of the charge, takes it only subject to the charge. I think that the plaintiff in the present case is entitled to a charge for Rs. 4,629-11-4. If he is entitled to a charge it is clear that that charge would bind the alienee from the 2nd defendant. I think the plaintiff is entitled to a mortgage decree for Rs. 4,629-11-4, with costs and interest at 6 per cent. from the date of plaint to date of payment. I would modify the decree of the Subordinate Judge accordingly. The parties will pay and receive proportionate costs throughout. Time for redemption three months from this date.

Spencer, J.

SPENCER, J. :—I agree with my learned brother that, on the evidence, the 2nd defendant was the real owner of the properties which were purchased with his money *benami* in the name of his wife Murugayee and of items 2, 3 and 4 which were purchased in the name of himself and his wife Meenakshi and I think that the fact that the purchases in Murugayee's name were not of one or two items but of the greater part of 2nd defendant's acquisitions negative the theory of advancement. [Cf. *Kerwick* v. *Kerwick* (3)].

I do not find any justification for the learned Subordinate Judge's opinion that the 2nd defendant grossly exaggerated his earnings in South Africa when he spoke of them as amounting to £ 50 or 60 a month. He ran a shaving saloon and opened a railway hotel during the height of the gold boom in Natal and the Rand and may easily have found those ventures very remunerative.

The circumstance that he mortgaged some of the lands that he had purchased for the occasion of his daughter's marriage does not in the least disprove his story of the manner in which he earned the capital that he invested in land.

As regards the plea of estoppel there is evidence that the 2nd defendant transferred a decree to plaintiff (Ex. XXII) and the plaintiff preferred a claim petition when the decree was attached before the judgment upon Dandapani Vaidyan's

3. (1920) I L R 48 C 260 at 274. 16. (1918) 36 M L J 618.

Mollaya Padayachi v. Krishnaswami Iyer.

Spencer, J.

suit and it was dismissed [*vide* Ex. XXII (*a*)]. The plaintiff must have been aware of the circumstances of 2nd defendant's family as it appears from his admissions in the witness-box and there can be no estoppel in favour of a party who knows the truth.

The mortgage suit must therefore fail except in respect of a sum of Rs. 4,629-11-4 which went to pay off the sale of the properties in favour of Dandapani. The 1st defendant, as the reversionary heir of 2nd defendant, was sufficiently interested in the preservation of the property to be entitled to redeem it under S. 91 of the Transfer of Property Act, or to apply to have a Court sale set aside under O. 21, R. 89, Civil Procedure Code. He was entitled to an equitable lien for the amount of the money so utilised [*see* observations in *Bhagwan Singh* v. *Mazhar Ali Khan* (17) and *Raja of Pithapuram* v. *Secretary of State* (18) and S. 32 of the Indian Trusts Act]. He acted neither speculatively nor officiously in paying money that 2nd defendant was bound as well as himself to pay. The plaintiff having obtained an assignment of 1st defendant's rights through the suit mortgage deed (Ex. A) is entitled to recover the amount by way of charge on the redeeemd properties [vide *Narayana Kutti Goundan* v. *Pechiammal* (19),]. There is no bar of limitation here, as there was in *Gopala Aiyangar* v. *Mummachi Reddiar* (7), as the present suit has been instituted on 19th April, 1918, and the sale was set aside on 31st January, 1916. I agree with the modification of the lower Court's decree proposed by my learned brother.

A. V. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

Perigi Venkobacharlu *Appellant** (*Defendant*)

v.

Sanji Radhabayamma *Respondent* (*Plaintiff*).

Venkobacharlu v. Radhabayamma.

Practice—Evidence—Suit different—Evidence in—Admission of, despite objection by defendant—Legality—Judgment based on such evidence—Setting aside of.

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*Appeal No. 265 of 1922. 9th July, 1924.

7. (1922) 17 L W 254. 17. (1914) I L R 36 A 272 at 276.

18. 16 M L T 375 at 380.

19. (1911) I L R 36 M 426 ; 22 M L J 364.

Where on the application of the plaintiff the Court below used the evidence in another suit as evidence in the suit tried by it, though the application was opposed by the defendant, and passed a decree against him, *held,* that the procedure was opposed to law and vitiated the whole trial. Venkobacharlu *v.* Radhabayamma.

The decree was accordingly set aside and the suit remanded for fresh trial to be disposed of according to law.

Appeal against the decree of the Court of the Subordinate Judge of Anantapur in O. S. No. 16 of 1920.

L. A. Govindaraghava Aiyar for appellant.

The Advocate-General for respondent.

The Judgment of the Court was delivered by

RAMESAM, J. :—The Subordinate Judge has used the evidence in O. S. No. 6 of 1920 as evidence in this case on the application of the plaintiff though it was opposed by the defendant. This procedure is opposed to law and vitiates the whole trial as irregular. The appellant contends that he has been prejudiced by the irregularity and we cannot say he was not for the Subordinate Judge states he perused the whole of the evidence so admitted and actually refers to the evidence of two witnesses in his judgment. Ramesam, J.

The decree is set aside and the suit remanded for fresh trial to be disposed of according to law. Costs to abide result. The Court-fee paid by the appellant will be refunded.

A. S. V. *Decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

Athamsa Rowther *Appellant** (*Defendant*)

v.

Ganesan and another *Respondents* (*Plaintiffs* 2 *and* 3).

Mortgage suit—Final decree in—Application for—Limitation—Civil Procedure Code, S. 105—Ex parte *decree—Propriety of—If and when can be questioned in appeal from final decree in suit—Mortgage suit—*Ex parte *decrees preliminary and final in—Order setting aside final decree while retaining preliminary decree—Propriety of—If can be questioned in appeal from final decree.* Athamsa Rowther *v.* Ganesan.

An application for a final decree in a mortgage suit is a proceeding in the suit and not in execution. Only one such application is permissible, and it must be put in within three years of the preliminary decree.

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*A A O No. 340 of 1923. 8th August, 1924.

Athamsa Rowther v. Ganesan.

An order setting aside the *ex parte* final decree in a mortgage while retaining the *ex parte* preliminary decree therein is an order "affecting the decision of the case" within the meaning of S. 105, Civil Procedure Code. The propriety of such an order can be challenged in an appeal against the decree finally passed in the suit.

Appeal against the order dated the 6th July, 1923 of the Court of the Subordinate Judge of Negapatam in A. S. No. 1 of 1923 preferred against the order of the Court of the Principal District Munsif of Tiruvalur in I. A. No. 1220 of 1917 in C. S. No. 248 of 1912.

K. Rajah Aiyar and *N. Panchapakesa Aiyar* for appellant.

K. S. Jayarama Aiyar for respondents.

The Judgment of the Court was delivered by

Wallace, J.

WALLACE, J. :—The respondents had obtained in the Court of the District Munsif, Tiruvalur, against the appellant a preliminary mortgage decree *ex parte* on 2nd September, 1912, and a final decree *ex parte* on 15th September, 1917. On 20th November, 1920, the appellant applied in I. A. No. 39 of 1921 to the District Munsif to set aside the *ex parte* final decree. This was allowed on 17th December, 1921. The entry on the notes paper referring to this runs :—"*Ex parte* decree set aside as per order on I. A. No. 39 of 1921. For written statement and draft issues adjourned to 6th January, 1922." The order itself is headed, "This is a petition to set aside the *ex parte* final decree passed against the petitioner," and concludes "It is ordered that the petition be and the same hereby is allowed." When the re-hearing of the application for final decree came on, it was contended before the District Munsif, a different Judge from the one who passed the order on I. A. No. 39 of 1921, that the notes paper showed that his predecessor had set aside not only the final decree but the preliminary decree as well, because he had called for written statement and draft issues and that therefore the whole suit should be taken up again. The District Munsif decided against that contention, found that the application for the final decree was barred by limitation, and he therefore dismissed the application On appeal the lower appellate Court held that the District Munsif's order on I. A. No. 39 of 1921 had set aside both the preliminary and final decrees. He reversed the District Munsif's order and remanded the whole suit for rehearing. The appellant (defendant) has now appealed against that order.

We think that the lower appellate Court's view on this matter is clearly wrong. The application to the District Munsif was to set aside the final decree only and this was clearly apprehended by the plaintiff also as is obvious from his counter in the I. A. The order itself, as quoted above, clearly gave what the petitioner in that I. A. asked for and no more. We must go by that order and not by what we think from the District Munsif's note that he intended the order to be. Even from the notes paper it would appear that the entry calling for written statement and draft issues was a mistake, as, on the adjourned date of hearing, it was a counter-statement and not a written statement that was put in and accepted by the same District Munsif and no draft issues were ever put in. The case was disposed of on that counter statement. It would take much stronger evidence to convince us that the District Munsif deliberately ordered a relief which he was not asked to give by either party. We are quite clear that only the final decree was set aside and the order of the lower appellate Court remanding the whole suit for trial cannot therefore be supported and must be set aside.

We are asked, however, not to accept the District Munsif's finding that the application for final decree was out of time. The preliminary decree was on 2nd September, 1912. On 17th March, 1913 an application for final decree was made and dismissed because the notice was not served. On 16th March, 1916 another application was filed, the fate of which is uncertain. On 23rd March, 1917 a third application was filed, the one now in question. It was commonly believed at that time that applications for final decrees were to be treated as applications for execution and were subject to the Rules of Limitation governing these. Of late the Courts have laid down that an application for a final decree is a proceeding in a suit and not in execution, and therefore only one application is permissible and it must be put in within three years of the preliminary decree. Adopting this later view of the law, the District Munsif dismissed the application of 23rd March, 1917 as out of time. The plaintiff contends that on the same view of the law the dismissal of his application of 17th March, 1913 on the ground that notice was not served was improper, because no notice was necessary on such an application, and therefore his application of 23rd March, 1917, may fairly be treated as a continuation of the application improperly dismissed on

Athamsa Rowther v. Ganesan.

Wallace, J.

17th March, 1913. We need not refer further to this question, because we think that the respondent-plaintiff is bound to succeed on another ground and that is that the appellant-defendant's application to set aside the *ex parte* final decree was itself out of time.

The *ex parte* final decree was passed on 15th September, 1917. In I. A. No. 39 of 1921 the defendant alleged that he became aware of it on 20th October, 1920. He did not file his I. A. until 20th November, 1920, one day over the thirty days allowed by law. We have verified that 19th November, 1920 was a working day in the Court. No explanation for the delay was offered in the petition or affidavit. *Prima facie* therefore his petition was out of time. The point was raised before the lower appellate Court which disposed of it on two grounds. First, that the ground of limitation was not taken by the plaintiff when I. A. No. 39 of 1921 was put in, and secondly, that the plaintiff cannot now take this point in appeal from an order setting aside the final decree since it is not a ground affecting the decision of the case within the meaning of S. 105 of the Civil Procedure Code. The first point is not a good one. In his counter the plaintiff clearly contended that the application was time-barred although he then thought that the date of the presentation was 11th January, 1921. It was a mere quibble to say that he had not taken the point because he made a mistake as to the actual date of presentation of the petition.

As to the second point it is quite true that certain High Courts have interpreted the words "affecting the decision of the case" in S. 105 as meaning "affecting the decision of the case on the merits"—see for example the Calcutta High Court in *Chintamony Dassi* v. *Raghunath Sahoo* (1), the Allahabad High Court in *Gulab Kunwar* v. *Thakur Das* (2), *Tassaduq Husain* v. *Hayat-un-nissa* (3) and of the Lahore High Court in *Fazal* v. *Hashmathi* (4), *Budhu Ram Honda Ram* v. *Ram Jan* (5) and *Sundar Singh* v. *Nigahiya* (6); but all these cases proceed on the principle that, when the setting aside of the order has re-opened the hearing of the suit on the merits, the propriety of the setting aside of the order cannot be attacked

1. (1895) I L R 22 C 981.
2. (1902) I L R 24 A 464.
3. (1903) I L R 25 A 280.
4. (1915) 31 I C 914.
5. (1920) 59 I C 676.
6. (1922) 72 I C 410.

Athamsa Rowther v Ganesan.

Wallace, J.

in an appeal in the suit. In our opinion, they do not go beyond that or lay down that in no case can the propriety of an order setting aside an *ex parte* decree be challenged in an appeal against a decree finally passed in the suit. For example, a proper case in which it could be set aside is the case set out in *Gopala Chetty* v. *Subbier* (7), where an *ex parte* decree had been set aside on behalf of a party who had never applied for it to be set aside. In *Nand Ram* v. *Bhopal Singh* (8) a bench of the Allahabad High Court followed *Gopala Chetty* v. *Subbier* (7) although perhaps it has stated too broadly the general proposition. It seems to us that the present case is another in which an order setting aside an *ex parte* decree may be properly attacked. It is clear that, when the result of the setting aside of the order has been the hearing of the suit *de novo* on its merits, no injustice would be done to any one by the decision of the case and the final result is not affected. But in the present case the result would be very different. The defendant has deliberately no doubt for good reasons from his own point of view refrained from opening the whole suit and only wants the final decree to be re-opened because he thinks he has a good point of limitation which will enable him to render the preliminary decree futile. So far from courting a decision on the merits he is trying to burke such a decision altogether. In such circumstances we cannot but hold that an order setting aside the *ex parte* final decree while retaining the *ex parte* preliminary decree is an order "affecting the decision of the case."

We consider therefore that it is open to us to consider the propriety of the District Munsif's order allowing the final decree to be set aside. The application was out of time and we can see no reason for indulgence or for not enforcing strictly the law of limitation. Technicalities may be waived in the case of a party *bona fide* seeking to do justice as well as to get it but the defendant's dodge is too apparent. He admits the mortgage claim, as he does not challenge the *ex parte* preliminary decree, but seeks to defeat it by a technicality of law affecting the final decree which only became available to him on the later interpretation of the law. He would seek to enforce the law of procedure against the plaintiff while claiming absolution for himself from the Law of Limitation. He would

7. (1903) I L R 26 M 604 : 13 M L J 308.
8. (1912) I L R 34 A 592.

Athamsa Rowther v. Ganesan.

Wallace, J.

re-open the suit only to the extent to which it would benefit himself. We are not prepared to relax the Law of Limitation in favour of such a person. We therefore hold that the application to set aside the final decree was out of time. The result is that the final decree of 15th September, 1917, stands. We therefore reverse the order of the lower appellate Court and we direct accordingly. The defendant will pay the plaintiff's costs in the lower Courts ; he will get his costs in this appeal.

A. S. V. *Order reversed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Gollapudi Seshayya *Appellant** (*Plaintiff*)

v.

Nadendla Subbayya and another *Respondents* (*Defendants.*)

Seshayya v. Subbayya.

Civil Procedure Code, O. 23—Leave to withdraw suit on condition of plaintiff paying defendants' costs of suit—Suit subsequent for same relief without paying such costs—Maintainability—Payment of costs after close of trial of subsequent suit—Effect—Champerty—Agreement to finance litigation—Validity—Tests.

A suit to set aside a sale deed executed by the plaintiff in favour of the defendant was withdrawn with leave to bring a fresh suit on condition of the plaintiff paying the defendant the costs of the suit. The plaintiff instituted a suit subsequently against the defendant for the same relief, but did not pay the costs of his first suit until after the close of the trial in that (the subsequent) suit.

Held, that the subsequent suit was barred under O. 23, Civil Procedure Code, and must be dismissed.

Where a question is raised as to the validity of an agreement to finance litigation, what has to be considered is whether such agreement is extortionate and unconscionable, or one made for the purpose of gambling in litigation or of injuring or oppressing others by encouraging unrighteous suits, in which case it would be contrary to public policy and unenforceable.

Second Appeals against the decrees of the Court of the Subordinate Judge of Bapatla in A. S. Nos. 105 and 99 of 1922, respectively, preferred against the decrees of the Court of the District Munsif of Ongole in O. S. Nos. 195 and 505 of 1921 respectively.

A. Krishnaswami Aiyar for appellant.

N. Rama Rao and *K. Kameswara Rao* for respondents.

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*S A Nos. 203 and 204 of 1923. 23rd April, 1924.

The Court delivered the following

JUDGMENT :—The respondent in both these appeals is one Subbayya, the adopted son of Ramachandrudu. He was dissatisfied with his father's misconduct and spendthrift ways and, consequently, wanted to file a suit for partition of the family property. As he had not sufficient funds to finance this litigation, he entered into relations with the appellant Seshayya who is a private vakil. On the 1st of November, 1916, Subbayya executed a sale deed in favour of Seshayya for Rs. 1,000, under which he sold one-half of his share in the family properties. Admittedly the consideration was fixed at a low figure on the ground that Subbayya's father was wasting the family property and alienating the same and that consequently the properties that would be recovered for Subbayya's share might be considerably less than what he really ought to have. It is found that Seshayya paid a sum of Rs. 600 towards the consideration for the sale deed, and a suit was filed by Subbayya and Seshayya jointly in 1918. A decree was obtained under which Subbayya was to get as his half share of the property all the properties which had not been alienated by his father, leaving the validity of the alienations undetermined. Before the decree was passed Subbayya agreed to certain items being decreed in favour of Seshayya and the remainder was to fall to his share. Subsequently Subbayya appears to have thought that he had been defrauded and he filed a suit, O. S. No. 641 of 1919, to set aside the sale deed in favour of Seshayya. That suit was withdrawn with leave to bring a fresh suit on condition of Subbayya paying the costs of the suit. Subbayya then filed his present suit, O. S. No. 195 of 1921, in which he again seeks to set aside the sale deed. Seshayya has also filed a suit O. S. No. 505 of 1921 in which he seeks to recover the property decreed to him in the prior litigation alleging that he obtained delivery through Court of the property decreed to him but that subsequently the plaintiff has obstructed his enjoyment. Subbayya's suit has been decreed and at the same time Seshayya has been given a charge upon the properties for Rs. 600 with interest Seshayya's suit for possession has been dismissed. Hence these two appeals.

The first point for consideration is whether Subbayya's suit is not barred by reason of O. 23, Civil Procedure Code, for it is admitted that he did not pay the costs of his first suit

until after the close of the trial in the present suit ; and it is contended that he is precluded from filing a fresh suit until he has complied with the condition imposed. In *Fischer* v. *Nagappa Mudali* (1) it was held, that when an order had been made giving permission to bring a fresh suit on condition of paying the costs before a specified date, a subsequent suit was barred if the costs had not been paid by that date. That case differs from the present in that the date was specified for payment of costs, whereas the order in the case under consideration does not specify any date. Without expressing any opinion as to the correctness of the decision in *Abdul Aziz Molla* v. *Ebrahim Molla* (2) that case was distinguished. In that case it was held that subsequent payment of costs was sufficient to warrant the reception and trial of a fresh suit which had been allowed to be brought on condition of those costs being paid. In that case the costs were paid before the suit was tried. This has been followed in a later case reported in *Shital Prosad* v. *Gaya Prosad* (3) where the question is discussed somewhat fully and the reasoning adopted for the conclusion is as follows:—"It is said that, inasmuch as permission to withdraw and bring a fresh suit is made conditional on a certain payment, the original suit cannot be deemed to be withdrawn until those costs have been paid and it must, therefore, be deemed to be a pending suit which becomes disposed of as soon as payment is made." This case was followed in *Kuldip Singh* v. *Kuldip Choudhuri* (4) and also in *Deb Kumar Roy* v. *Debnath Barnes* (5), but I can find no authority in this Court for holding this view which, with all respect, appears to me to be incorrect. These cases all assume that the permission granted by the Court is not only permission to bring a fresh suit but also permission to withdraw the first suit, and that consequently until the condition is fulfilled the first suit is pending. This seems to me to overlook the provisions of O. 23, R. 1 (1) which gives a plaintiff power to withdraw his suit at any time without the permission of that Court. Consequently, I think that we must read the latter part of cl. 2 (*b*) as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in

1. (1909) I L R 33 M 258.
2. (1904) I L R 31 C 965.
3. (1914) 19 C L J 529.
4. (1917) 3 Pat. L J 63.
5. (1920) 64 I C 738.

place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions. If the first suit is still pending as held in the above cases, it would be open to the plaintiff to obtain permission under O. 23, and instead of complying with the conditions of that permission, to go to the Court and demand that the trial on his first suit should be proceeded with and this could be done however long the interval might be. For these reasons I am unable to accept the view that the first suit is still pending, for it has been withdrawn and that withdrawal, in my opinion, takes effect from the date of the Court's order. If the Calcutta view were to be applied in the present case, it would appear, as observed in those judgments, that the trial of a second suit is barred under S. 10, Civil Procedure Code, until the first suit is disposed of by performance of the condition imposed by the order granting leave. In the present case, therefore, the whole of the trial of the suit which took place, before the costs were paid, would be bad under S. 10, Civil Procedure Code, for want of jurisdiction and the whole suit would have to be tried again. There is another case in the Calcutta High Court reported in *Sajjad Hossain* v. *Ram Lal Sahu* (6) where it was held that payment might be made after the institution of the suit but that suit would not be deemed to be validly instituted until the date of such payment. In the view that I take, I would follow *Fischer* v. *Nagappa Mudali* (1) and hold that it extends, as was held in *Hari Nath Dass* v. *Syed Hossain Ali* (7) and *Subal Chandra* v. *Mosaraf Ali* (8), to cases where no time is fixed for fulfilling the condition.

In support of the view held by the Calcutta High Court, reference has been made to other cases in which similar conditions were held not to be mandatory, *Ramayyangar* v. *Krishnayyangar* (9) with reference to the provisions of S. 539, Civil Procedure Code, *Ammukutty* v. *Manavikraman* (10) with reference to the permission necessary to bring a suit against a receiver and *Mahomed Azmat Ali Khan* v. *Lalli Begum* (11) with reference to the certificate requisite for bringing a suit

1. (1909) I L R 33 M 258.
6. (1911) 15 I C 159.
7. (1905) 2 C L J 480.
8. (1917) 38 I C 476.
9. (1886) I L R 10 M 185.
10. (1920) I L R 43 M 793.
11. (1881) I L R 8 C 422 at 434.

Seshayya v. Subbayya.

under the Pensions Act. I do not attach much importance to these cases, for in all of them the Court *prima facie* has jurisdiction to try such suits ; and, beyond imposing a condition precedent, none of the provisions referred to take away the jurisdiction of the Courts ; whereas under O. 23, R. 2 (3) a Court is definitely precluded from entertaining a second suit when no permission has been granted. Unless, therefore, permission has been given, a Court is specifically forbidden to entertain a second suit.

In this view, Subbayya's suit is barred under O. 23 and must be dismissed. Second Appeal No. 203 must, therefore, be allowed and the suit dismissed with costs throughout to be paid by 1st respondent.

As regards Second Appeal No. 204, the Subordinate Judge has found that the sale deed in favour of Seshayya is "vitiated by undue influence and fraud and cannot be enforced" and, consequently, has dismissed the suit " which is based upon it. " I may observe here that the suit is not based upon the sale deed but upon the decree obtained in pursuance of that sale deed, namely, the decree in O. S. No. 12 of 1918. In giving his finding the Subordinate Judge does not definitely specify the facts which he finds to be sufficient to prove undue influence and fraud. In the plaint the plaintiff stated that the sale deed was brought about owing to several misrepresentations specified in paragraph 4, but there is no finding by the Subordinate Judge that these misrepresentations were made, and apparently the statements set out in the plaint are substantially correct. The cases relied upon by the Subordinate Judge for holding that the sale deed is invalid are merely cases in which the transactions were set aside as being hard, unconscionable and opposed to public policy. *Chunni Kuar* v. *Rup Singh* (12), *Loke Indar Singh* v. *Rup Singh* (13) and *Husain Bakhsh* v. *Rahman Husain* (14). It has been held that in this country *champerty* is not necessarily opposed to public policy ; and in considering whether champertous agreements should be set aside, it has to be considered whether such an agreement is extortionate and unconscionable, or one made for the purpose of gambling in litigation or of injuring or oppressing others by encouraging unrighteous suits, in which

12. (1886) I L R 11 A 57. 13. (1888) I L R 11 A 118.
14. (1888) I L R 11 A 128.

Seshayya v. Subbayya.

case it would be contrary to public policy and unenforceable. These facts do not seem to have been considered by the Subordinate Judge. He has not found what the facts were which made the bargain unconscionable or otherwise opposed to public policy. He finds that property worth Rs. 2,000 was sold for Rs. 1,000 and that Rs. 600 cash was actually paid as consideration. The properties which have passed under the sale deed are, no doubt, worth Rs. 2,000, but it was by no means certain that the plaintiff's suit would be successful, or, at any rate, successful to such a large extent. Half of the family property had been alienated and, if those alienations had been found to be valid, Subbayya's share would have come to Rs. 1,000 or less, the consideration agreed to be paid, to which must be added additional compensation for Seshayya's trouble and knowledge of litigation. Here again I must note that the Subordinate Judge has not discussed the question whether the decree in pursuance of the sale deed was obtained by fraud. There is no such allegation in the plaint, but the Subordinate Judge seems to hold in paragraph 7 of his judgment that the undue influence exercised in the suit was that of the plaintiff's vakil, who is not a party to this litigation, and not the influence of Seshayya ; and he has also omitted to notice that Subbayya did not pray to have the decree set aside, although an amendment was asked for but refused by the District Munsif. There are other points to be considered also in the appeal which have not been dealt with by the Subordinate Judge, one of these being whether Seshayya's remedy was by suit or by execution proceedings. It was on this latter ground that the District Munsif dismissed his suit without giving him an opportunity of treating the suit as an execution petition. It would also be necessary to consider what effect the dismissal of Subbayya's suit will have upon Seshayya's suit, for in execution proceedings a claim by Seshayya to these properties was allowed (*vide* Ex. VI) ; and it has to be considered whether that was not a final adjudication of the rights of the parties. Appeal No. 99 of 1922 will accordingly be remanded for fresh disposal in the light of the above remarks. Costs in this Court will abide the result.

Court-fee in S. A. No. 204 of 1923 will be refunded.

A. S. V. *S. A. No.* 203 *allowed.*

S. A. No. 204 *remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Ivaturi Brahmayya Lingam *Appellant** (*Plaintiff*)

v.

Kamisetti Mallamma *alias* Kanakamma and another *Respondents* (*Defendants*).

Brahmayya Lingam *v.* Mallamma.

Gift—Consideration—Past and future co-habitation—Document drafted as sale deed—If can be set aside—Purpose carried out—Effect.

In a sale deed of certain properties executed by plaintiff in favour of the 1st defendant, the consideration was recited to be Rs. 800, but the transaction was found to be really a gift to the 1st defendant for the past co-habitation and for future co-habitation which the latter promised. In a suit by the plaintiff to set aside the deed, *held*, it was a well-established rule of equity that a person who has transferred property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose had been carried out and as part of the consideration was for past co-habitation and the defendant continued as plaintiff's concubine for some time after the deed, plaintiff could not succeed. *Ayerst* v. *Jenkins*, 16 Eq. 27 ; *Deivanayaga Padayachi* v. *Muthu Reddi*, I. L. R. 44 M. 329 followed. *Dasi Muthukannu* v. *Shanmugavelu Pillai*, I. L. R. 28 M. 413 distinguished.

Second Appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore in A. S. No. 374 of 1920, preferred against the decree of the Court of the Additional District Munsif of Tanuku in O. S. No. 92 of 1919 (O. S. No. 148 of 1919 on the file of the Principal District Munsif of Tanuku).

V Ramadoss and *V. Krishna Mohan* for appellant.

A. Venkatarayaliah and *L. Venkatanarasiah* for respondents.

The Court delivered the following

JUDGMENT :—In this case the plaintiff sues to recover certain items of property which he conveyed to the 1st defendant under Ex. I. The finding of the lower Courts is that though a consideration of Rs. 800 is recited in it and it purports to be a sale for that consideration, the transaction was really one by which the plaintiff made a gift of the property to the 1st defendant for the past co-habitation and for future co-habitation with her which she promised. The plaintiff is the appellant before me and the contesting defendant is a transferee for value from the 1st defendant. The first Court

*S A No. 1058 of 1921. 14th March, 1924.

Brahmayya Lingam v Mallamma.

decreed the suit in favour of the plaintiff holding that the sale to the 1st defendant by the plaintiff was an invalid transaction as the consideration was an immoral and illegal one and that the 2nd defendant was a transferee for value, but with notice and was thus not a *bona fide* purchaser. On appeal the Subordinate Judge, though he agreed in the first finding that the consideration for the sale was past and future co-habitation of the woman with the plaintiff, he held that it was not shown that the 2nd defendant was not a *bona fide* purchaser and hence he dismissed the suit against him. In Second Appeal it is contended before me that in deciding the second point the Subordinate Judge has laid the burden of proof wrongly on the plaintiff and that the 2nd defendant should have been called upon to prove that he was a *bona fide* purchaser. But before considering this question it is necessary to decide what plaintiff's rights are on the finding that the sale deed Ex. I was for past and future co-habitation. The sale no doubt is invalid, but it is a different question whether any relief should be given to the plaintiff in the circumstances of the case even as against the 1st defendant. There can be no doubt that if the principles laid down in *Ayerst* v. *Jenkins* (1) applies, the plaintiff cannot set aside this transaction as he was a party to it. The principle of that case was given effect to in a very similar case in *Deivanayaga Padayachi* v. *Muthu Reddi* (2), where it is laid down that it is a well-established rule of equity that a person who has transferred a property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out. There can be no doubt that, in the case before me, the purpose has been carried out as part of the consideration was for past co-habitation and the woman continued as a concubine of the plaintiff for at least six or seven months after the sale deed was executed. On the other side my attention has been drawn to the ruling in *Dasi Muthukannu* v. *Shanmugavelu Pillai* (3) where it was laid down that the plaintiff there who was a young and inexperienced man and assigned to the defendant, a dancing girl, a mortgage for Rs. 1,500 the consideration stated in the deed being payment in cash and jewels to the plaintiff and the discharge by the defendant of debts due by the plaintiff was entitled to have the assignment set aside on the ground that no consideration

1. (1873) L R 16 Eq 27. 2. (1920) I L R 44 M 329.
3. (1905) I L R 28 M 413.

Brahmayya Lingam v. Mallamma.

really passed as recited therein but that the real consideration was the future continuance of immoral relations between himself and the sister of the defendant. The attention of their Lordships was drawn to the case in *Ayerst* v. *Jenkins* (1), but their Lordships were of opinion that the case related only to gifts of property and that the principles laid down by Lord Selborne in it would not apply to cases of sales and assignments like the one they were dealing with. They were in that case able to hold that the transaction was not a gift but a sale. Whether that is right or wrong I need not pause to consider and I need not also consider whether their Lordships' ruling that the case in *Ayerst* v. *Jenkins* (1) should be confined to cases of gifts alone and would not apply to cases of sales and other transfers, should be followed or not, for, I think that the present case is distinguishable from that case. Here it is perfectly clear that the transaction between the plaintiff and the 1st defendant was in reality a gift and nothing else. According to the plaintiff the transfer was without any consideration whatsoever and the recital of consideration in the document was a false recital. In fact, this case was that he made over the property to the 1st defendant solely in consideration of her past co-habitation and future co-habitation with him and that it was not intended that he should receive any other consideration for the transfer. It follows therefore that even the way in which *Dasi Muthukannu* v. *Shanmugavelu Pillai* (3) distinguishes the case of *Ayerst* v. *Jenkins* (1) is correct, this case fails. The principles recognised in *Ayerst* v. *Jenkins* (1) are followed in the case of *Deivanayaga Padayachi* v. *Muthu Reddi* (2). In *Dasi Muthukannu* v. *Shanmugavelu Pillai* (3) it must also be noted that their Lordships do not express a confident opinion but say at page 419 "Even if this conclusion [that is, the case of *Ayerst* v *Jenkins* (1)] is confined to cases of gifts were not right, it must be held that the case of the plaintiff is hardly one in which he can be said to be *in pari delicto.*" They were able to arrive at that conclusion on a consideration of the fact that the plaintiff in that case was a youth of about 20 years of age and that the assignment was brought about by the influence of persons acting in complicity with the defendant and her sister who led the plaintiff into evil ways. There is no such evidence in this case. The plaintiff is a man of

1. (1873) L R 16 Eq 27. 2. (1920) I L R 44 M 329.
3. (1905) I L R 28 M 413.

Brahmayya Lingam v. Mallamma.

about 30 or 31 and on the facts here it cannot be said in any way that he was not *in pari delicto* with the 1st defendant in this transaction. That being so his case even as against the 1st defendant should have failed. It is not necessary therefore to consider whether if the plaintiff was entitled to succeed against the 1st defendant he could succeed against the 2nd defendant. The question whether the 2nd defendant was a purchaser for value without notice does not really arise.

The Second Appeal is dismissed with the costs of the 2nd defendant.

T. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Kuppammal *Petitioner** (*Petitioner*)

v.

Muniappa Chetti and others *Respondents* (*Counter-petitioner and nil*).

Kuppammal v. Muniappa Chetti.

Guardians and Wards Act, S. 43 (1)—*Scope of—Court if can pass order against stranger*—De facto *guardian—Order against—Validity of.*

Under S. 43 (1), Guardians and Wards Act, it is only the conduct or proceedings of any guardian appointed or declared by Court which can be called in question. Where the minor was in the custody of a certain person, and thereafter a Court guardian was appointed, the Court has no jurisdiction to call upon the former to deliver up jewels of the minor under S. 43 of the Act. *Wallace Sitha Bai* v. *Wallace Radha Bai*, 36 M L J 189 distinguished ; *Komma Somakka* v. *Kovidala Pedda Ramiah*, 10 M L T 483 followed.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Coimbatore in I. A. No. 341 of 1922 in I. A. No. 189 of 1922 in O. P. No. 91 of 1919.

A. Vasudeva Menon for petitioner.

V Narasimha Aiyangar for respondents.

The Court delivered the following

JUDGMENT :—In this case the minor's guardian was the mother, the present petitioner, appointed on 29th November, 1919. Some time before that the minor lived with 2nd respondent, her uncle, presumably against the wishes of the

*C R P No. 876 of 1922. 24th April, 1924.

Kuppammal v. Muniappa Chetti.

mother. The girl was returned to the mother on 18th December, 1919 and the present application is by the mother for the return of two jewels said to have been on the person of the minor when she went to 2nd respondent. The mother's attitude is a peculiar one. She denies having put in any such application and now says the District Judge has acted without jurisdiction. I think he has. The mother is no doubt a person interested in the minor under S. 43 (1) of the Guardians and Wards Act but it is only the conduct or proceedings of any guardian appointed or declared by Court which can be called in question. The 2nd respondent has ceased at the end of 1919 to be even a *de facto* guardian and was not such at the date of the application by the mother in 1922. The case therefore in *Wallace Sitha Bai* v. *Wallace Radha Bai* (1) has no application.

The learned District Judge has proceeded on the powers conferred by S. 43 of the Act. But as pointed out in *Komma Somakka* v. *Kovidala Pedda Ramiah* (2) the Act does not profess to give the District Court any power or authority over persons other than the guardian of the minor except in certain instances which do not apply here. I therefore think in the circumstances of this case the District Judge acted without jurisdiction and he had no right to call upon 2nd respondent to deliver up the jewels under S. 43 of the Guardians and Wards Act. I think interference is called for and I allow the Civil Revision Petition and set aside the order of the District Judge with costs.

T.S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Ramanuja Naidu and others *Petitioners* (Plaintiffs 1 to 3, 5 and 6)*

v.

Muthu K. R. V. Alagappa Chettiar and another *Respondents (Defendants and 4th plaintiff).*

Ramanuja Naidu v. Alagappa Chettiar.

*Court Fees Act, Sch. II, Art. 17 (iii)—Scheme suit—Prayer for temporary mandatory injunction to compel defendant to deposit amount in Court—*Ad valorem *Court-fee if payable thereon.*

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*C R P No. 134 of 1924. 28th July, 1924.

1. (1918) 36 M L J 189. 2. (1911) 10 M L T 483.

Ramanujam Naidu v. Alagappa Chettiar.

Where in a suit under S. 92, Civil Procedure Code, the plaintiff claims among other reliefs a temporary mandatory injunction to compel the defendant to deposit in Court immediately a sum of Rs. 1,24,000 due from him to the trust, it is in effect only a prayer for an account falling clearly within the express words of S. 92. The character of the suit is not altered and a Court-fee of Rs. 50 as fixed in Sch. II, Art. 17 (*iii*) of the Court Fees Act is sufficient.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order, dated 7th January, 1924, of the Court of the First Additional Subordinate Judge of Madura in O. S. No. 10 of 1923 (O. S. No. 198 of 1922 on the file of the Court of the Subordinate Judge, Madura).

C. S. Venkatachariar for petitioners.

C. V Anantakrishna Aiyar, P. S. Narayanaswami Aiyar and *D. Ramaswami Aiyangar* for respondents.

The Court delivered the following

JUDGMENT :—The learned Subordinate Judge has held that a Court-fee of Rs. 2,200 odd is payable on the plaint, and the plaintiff files this Civil Revision Petition attacking the correctness of the order. The suit has been instituted under S. 92 of the Civil Procedure Code in respect of Kudal Alagar and Madhanagopalaswami Devasthanams at Madura. The plaint contains a prayer for various reliefs, such as the removal of the defendant from trusteeship, the appointment of a new trustee, the settling of a scheme, etc. In addition, the plaintiffs ask for the issue of " a temporary mandatory injunction " to compel the defendant to deposit in Court immediately a sum of Rs. 1,24,000 which the plaintiffs claim is due from the defendant to the Devasthanams. The Subordinate Judge has held that a Court-fee is payable on this sum to which the relief mentioned relates.

The only question to be decided is Is this a suit that falls under S. 92, Civil Procedure Code ? Under Art. 17 of Schedule II to the Court Fees Act, if a suit is brought under S. 92, the fee payable upon the plaint is a sum of Rs. 50. A suit to obtain a decree directing accounts and enquiries comes clearly within the express words of section 92. The Subordinate Judge has committed a slight error in saying that there is a prayer for the issue of a mandatory injunction. As I observed the words used are " a temporary mandatory injunction." In any event, the suit is, in my opinion, substantially one under

Ramanuja Naidu v. Alagappa Chettiar.

S. 92 ; for, all that the plaintiffs in effect ask is, that an account should be taken and that the defendant should be ordered to pay such amount as might be found due from him on such an account being taken. The sum mentioned in the plaint is merely an estimate and plaintiffs' valuation of the relief cannot alter the character of the suit. The Court-fee paid therefore, namely, Rs. 50 is the proper fee and I set aside the order of the lower Court and allow the Civil Revision Petition with costs.

T. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

The Public Prosecutor ... *Appellant* in both*

v.

Katta Prakasam ... *Accused in C. C. No. 20 of 1922.*

The Public Prosecutor v. Katta Prakasam.

Penal Code, S. 182—Application for transfer of criminal case—Affidavit by third party handed over to pleader and filed by him in Court—If amounts to information to public servant.

In support of an application to transfer a criminal case, a third swore to an affidavit containing allegations which were subsequently found to be false and handed it over to the pleader of the complainant-applicant, who filed it in Court. The deponent was prosecuted therefor under S. 182, Indian Penal Code. *Held,* the affidavit having been given to the complainant's pleader on his behalf and as it was open to the complainant to instruct his pleader not to file the same, there is no information given to a public servant within the meaning of S. 182 *Queen-Empress* v. *Santaram* (Ratanlal's unreported Criminal cases of the Bombay High Court, page 315) followed.

Appeals under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Sessions Judge of Kistna at Masulipatam in Cr. Appeals Nos. 37 and 38 of 1923 on his file (C. C. Nos. 20 and 21 of 1922 respectively on the file of the Court of the First Class Magistrate of Gudivada).

V. L. Ethiraj for appellant.

V. Ramadoss and *K. Subba Rao* for accused.

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*Cr. Appeals Nos. 1107 and 1108 of 1923. 4th August, 1924.

The Public Prosecutor v Katta Prakasam.

Madhavan Nair, J.

The Judgment of the Court was delivered by

MADHAVAN NAIR, J. :—These are two appeals by the Crown against the acquittal by the Sessions Judge of Kistna of Katta Prakasam, accused in C. C. No. 20 of 1922, and Annamraju, accused in C. C. No. 21 of 1922, of an offence under S. 182, Indian Penal Code.

One Gangamma, complainant in a case pending before the First Class Bench Magistrate of Masulipatam, applied before the District Magistrate for a transfer of the case. This application was supported by two affidavits presented by the complainant's pleader, one by Katta Prakasam, the son of the complainant, and the other by Annamraju, a stranger, which contained certain allegations against the President of the Bench of Magistrates which were on subsequent enquiry found to be false. The transfer application was rejected and the two accused were charged before the Sub-divisional 1st Class Magistrate, Gudivada, with having committed offences under S. 182, Indian Penal Code. The Sub-divisional Magistrate on going into the evidence found that the accused in the two cases gave false information to a public servant within the meaning of S. 182, Indian Penal Code, and sentenced each of them to a fine of Rs. 100 or six weeks' rigorous imprisonment. On appeal the learned Sessions Judge found that the allegations were false, but set aside the convictions and acquitted the accused.

In our opinion, the orders of the learned Sessions Judge acquitting the accused are right though not for the reasons given by him. In *Emperor* v. *Matan* (1), the decision followed by the Sessions Judge, it was pointed out that statements made by an accused person being privileged cannot be considered to be "information" given to a public servant and, consequently, it was there held that an accused, who in support of his application for the transfer of the case against him to some other Magistrate makes unfounded and defamatory allegations against the trying Magistrate, cannot be convicted in respect of the allegations under S. 182, Indian Penal Code. That decision is obviously inapplicable to the present cases inasmuch as the statements in the affidavits were made by persons who were not accused in the case at the time when they made the statements. The word "information" is not defined in the Indian Penal Code or in the Criminal Procedure Code.

1. (1910) I L R 33 A 163.

The Public Prosecutor v. Katta Prakasam.
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Madhavan Nair, J.

Assuming that the statements in question amount to "information," it seems to us that it cannot be held that it was the accused who gave the information to the public servant within the meaning of S. 182, Indian Penal Code. The point for decision is not quite free from difficulty. In *Queen-Empress* v. *Santaram* (2), it is stated that "the accused, a liquor shopman at India, reported to his master that the Abkari Inspector had asked him for money and had watered some liquor in the shop with a view to getting him into trouble. The master as intended by the shopman reported the matter to the Collector, who after causing enquiry to be made gave the Abkari Inspector permission under S. 195 (*a*), Criminal Procedure Code, to prosecute the shopman under S. 182, Indian Penal Code, in order to clear his own character." It was held by the Bombay High Court, on a reference made by the District Magistrate that the accused was not guilty of an offence against S. 182, Indian Penal Code, *i. e.*, of giving false information to a public servant with intent to cause injury, inasmuch as his master to whom he gave certain information alleged to be false was not a public servant.

In the two appeals before us it is not quite clear as into whose hands the affidavits were given by the accused; but a perusal of the evidence would show that these affidavits must be considered to have been given to the complainant's pleader on her behalf. It was open to the complainant, Gangamma, to instruct the pleader not to file these affidavits if she liked. Following the Bombay decision above quoted, we hold that information was not given by these accused to a public servant in these appeals within the meaning of S. 182, Indian Penal Code.

In Criminal Appeal No. 1107 of 1923 in which the accused is Gangamma's son, Katta Prakasam, it was argued by Mr. Ethiraj for the Public Prosecutor that, since the statements were made by her son to the pleader on her behalf, it must be considered that he himself made those statements in the Court when the affidavit was filed. But it must be remembered that the pleader is not the agent of her son but represents his mother; no distinction could, therefore, be made between the case of the son, *viz.*, Katta Prakasam, and that of the stranger.

We dismiss both the appeals.

T. S. V. *Appeals dismissed.*

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2. Ratan Lal's unreported Criminal Cases of the Bombay High Court, page 315.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Turka Hussain Saib and others *Accused* in C. C. No. 137 of 1924 on the file of the Court of the Stationary Sub-Magistrate of Pattikonda.*

Hussain Saib, *In re.*

Criminal Procedure Code, S. 421—Criminal appeal—Hearing of, at time of presentation of appeal—Legality—Posting for hearing under S. 421—Lapse of reasonable time—Original records of Court below containing depositions—Necessity—Legal Practitioner—Misconduct—Practitioner who drafted memo. of appeal—Failure to argue appeal at time of presentation of appeal.

A criminal appeal ought not to be heard at the time of the presentation of the papers, even for the purpose of dismissal under S. 421, Criminal Procedure Code. The posting for the purpose of hearing under S. 421 must be a special posting after a reasonable time—not less than a week. If questions of fact are argued in the appeal, the appeal ought not to be disposed of even under S. 421 without sending for the original records of the Court below containing the depositions.

A pleader who has looked into the papers of a case for the purpose of drafting grounds of appeal is not guilty of professional misconduct merely because he is not prepared to argue the appeal at the time of presentation of the appeal papers.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the Sessions Judge, Kurnool Division, in his letter, dated 25th July, 1924 (Dis. No. 183 of 26th July, 1924).

The Court made the following

ORDER :— I entirely agree with the remarks of the Sessions Judge in his letter of reference. The decisions mentioned by him, *viz.*, *Ramtohal* v. *Emperor* (1) and *Rangacharlu* v. *Emperor* (2) both lay down that a criminal appeal should not be heard at the time of the presentation of the papers, even for the purpose of dismissal under S. 421.

The posting for the purpose of hearing under S. 421 must be a special posting after a reasonable time—not less than a week. *Ramtohal* v. *Emperor* (1). This is the practice in the High Court and ought to be the practice in the mofussil wherever it is not.

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*Cr R C No. 520 of 1923.
(Case Referred No. 58 of 1924). 5th August, 1924.

1. (1909) I L R 36 C 385.
2. (1905) I L R 29 M 236.

Hussain Saib, *In re.*

I may also point out that the view of the learned Sub-divisional Magistrate, *viz.*, that a pleader who has looked into the papers of a case for the purpose of drafting grounds of appeal is guilty of professional misconduct if he is not prepared to argue the appeal at the time of presentation of the appeal papers is not correct.

It is well known that a memorandum of appeal containing all possible grounds (some of which may be ultimately untenable) can be drafted by a mere perusal of the judgment and without the use of the depositions, whereas, for *arguing* the questions of fact, the depositions have to be carefully studied.

In *Rangacharlu* v. *Emperor* (2) it is pointed out that, if questions of fact are argued in the appeal, the appeal ought not to be disposed of even under S. 421, without sending for the original records of the Court below containing the depositions. I agree with this.

The result is, the dismissal of the appeal by the Sub-divisional Magistrate is set aside and the appeal is remanded to him for rehearing and disposal according to law.

A. S. V. *Appeal remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Pulipati Venkiah *Petitioner* (Accused).*

Venkiah, *In re.*

Penal Code, S. 161—Essentials of offence—Karnam receiving bribe from villager for getting darkhast land—Official act—If an offence.

In a charge under S. 161, Penal Code, it must be shown that the accused took the bribe as a motive for doing an official act. Where the charge against a *Karnam* was that he received a bribe from a villager on the understanding that he would get him some *darkhast* land, it does not constitute an offence under S. 161, Indian Penal Code, as getting *darkhast* is not the official act of a *Karnam.*

There is a nice distinction between what is criminal and what is departmentally reprehensible and a public servant can only be punished under the Penal Code when his act fulfils all the conditions of an offence as therein defined.

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* Cr. R. C. No. 1 of 1924.
(Cr. R. P. No. 1 of 1924.) 5th August, 1924.

2. (1905) I L R 29 M 236.

Venkiah, *In re.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of Guntur in Cr. Appeal No. 75 of 1923 preferred against the judgment of the Court of the Sub-divisional Magistrate of Guntur in C. C. No. 121 of 1923.

Dr. S. Swaminathan for petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—The petitioner has been sentenced to six months' rigorous imprisonment and a fine of Rs. 100 for "receiving a bribe of Rs. 20 from a villager on the understanding that he would get him some land on darkhast in his capacity as Karnam, an offence punishable under S. 161, Indian Penal Code (*vide* 'Charge')."

The villager (prosecution 1st witness) says that he gave the Karnam Rs. 20 as he promised that he would get Government land for him. He got the land but only half as much as he expected. The learned Sessions Judge takes the complaint to be that the Karnam was given the bribe in the hope that he would recommend the grant of land. He managed to convince the parties that the land was as good as got, and so the charge is proved that the Karnam promised to get the land for the villager.

It is difficult to say from all this exactly what the Karnam is supposed to have done. In a charge under S. 161, Indian Penal Code, it must be shown that the accused took the bribe as a motive for doing an official act. But getting darkhasts is not the official act of a Karnam. He may have cheated the villager into thinking that he was the official who granted darkhasts ; but that does not come out clearly from the evidence, and the Sessions Judge seems to be right in holding that only his recommendation was bought.

But even if the charge had run that in his capacity of Karnam he would recommend the darkhast, that still would not be an official act. He might have been charged perhaps with offering to influence the Tahsildar or some higher official, but it is not clear on the facts that he ever did so offer. Anyhow a charge that a Karnam took a bribe as a reward for doing the official act of granting darkhasts in the capacity of Karnam

Venkiah, *In re.*

cannot stand, and this proposition is not controverted on behalf of the Crown. It was not made clear to the petitioner what criminal offence he had committed and the conviction must be quashed. There is a nice distinction between what is criminal and what is departmentally reprehensible and this distinction must be carefully borne in mind. A public servant can only be punished under the Penal Code when his act fulfils all the conditions of an offence as therein defined.

I allow this petition and reverse the sentence. The fine to be refunded. The petitioner's bail is released.

T. S. V. *Petition allowed : Sentence reversed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Kumaragurudasa Swamigal *Petitioner**

v.

Krishnaswami Mudaliar and others *Respondents (Accused 1 to 5).*

Kumaragurudasa Swamigal v. Krishnaswami Mudaliar.

Penal Code, Ss. 499, 500—Religious controversy—Personal character or respectability not assailed—Violent language—Defamation.

In reply to a book written by the complainant attacking Vaishnavism and its founders, the accused retorted by a similar publication and both books dealt with highly controversial religious matters. Very violent language was used in the latter about the complainant. *Held,* it did not amount to defamation, as the personal character or respectability of the complainant was not in any way assailed.

Petition under S. 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of discharge, dated 10th November, 1922, and the order of acquittal, dated 19th March, 1922 of the Court of the Chief Presidency Magistrate of Egmore in C. C. No. 11471 of 1922.

The following are the material facts :—

"The petitioner, a Saiva ascetic and religious teacher, wrote and published a controversial work called *Saiva Samaya Sarabham* in which he attacked Vaishnavism, its founders, his chief disciples and their practices. In reply to this attack the 1st respondent wrote and published *Parabrahma Tatva Vilakkam*

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*Cr R C No. 551 of 1923
(Cr R P No. 439 of 1923). 22nd August, 1924.

in which he refuted *seriatim* the main theses dealt with in the other book and therein used language which the petitioner alleged to amount to a defamation of himself personally. The following portions of the judgment of the Chief Presidency Magistrate (L. A. Cammiade, Esq.) bring out the material facts :—

The drift of these various passages may be summed up as follows :—

The writer of the *Saiva Samaya Sarabham* has bolstered his attacks on Vaishnavism by repeated misquotations and misinterpretations of the sacred texts. He has also omitted in his quotations portions of texts that tell against him and he has thereby falsified their meaning. He is either ignorant or an unscrupulous person to have done such a thing. He also misunderstands texts and makes absurd arguments. He does not even understand his own religion properly, and yet he poses as a great controversialist. The nonsense he has written and the expressions he has used when talking of holy persons shows him to be a vain glorious fool of a vulgar and abusive turn of mind. He is a wandering impostor and an atheistic reviler. In his hatred for Vishnu he is like Hiranya, Ravana, Duryodhana and other notorious evil-doers. He has the temperament of an Asura and has even something of the Rakshasas and of the Paisachas in his nature. In his doctrines he is a Pashanda. His destination is hell.

The main charge, and in my opinion also the most serious, here levelled against the character of the complainant is that of controversial dishonesty. This charge occurs in one form or another in about thirteen out of twenty passages already referred to.

The accused plead that these charges are protected by the sixth exception to S. 500 of the Indian Penal Code.

As a typical example of this item of the attacks that have been made by the accused on the character of the complainant, the prosecution selected the passage on page 33 of the 1st accused's book, lines 6—13. The full translation of this passage is as follows . " Is this man Kumaraguru Dasan to swallow up the Mandalas mentioned in the Sruti commencing from Ether up to Aksharam as well as all the deities ? Why has he lost sight of them ? Did he omit them from ignorance (literally blindness) ? Or is it that without understanding the Sruti and knowing only from others the small portion of it which commences from Parvati and which ends with Ether, he has nevertheless ventured to come forward to utter falsehoods at randon believing that no one knows the Sruti better than himself ? "

In this passage the accused has taken as he is entitled to do, strong exceptions to the complainant having omitted from his quotation a portion of a Sruti which in the accused's opinion are of vital importance to the matter in controversy, namely, whether Siva or Vishnu is the dominant deity. The falsehoods referred to by the accused are the statements made by the complainant derogatory to the pre-eminence of Vishnu as a God. In a controversy of this character the doctrines held false on the one side are held true by the other. Therefore the word "falsehood" as used in this passage is not, in my opinion, defamatory.

Komaragurudasa Swamigal v. Krishnaswami Mudaliar.

A more polite expression might have been used. But the complainant having himself indulged in vituperative language when attacking Vaishnavites cannot very well complain that he has been answered in similar language.

The other passages in which the complainant's controversial methods are attacked are of a similar character. In each case the accused gives his reasons for holding that the complainant has misconstructed or misused the texts on which he relies and then proceeds to make uncomplimentary remarks about the complainant. Milder words might have been used by the accused, but the words he uses amount to nothing more than a flat contradiction of the complainant's affirmation coupled with an expression of opinion on the complainant's character and mentality as revealed by the complainant's polemical methods. Given the circumstances of this case, I do not consider the expressions defamatory.

The next most serious attack on the complainant's character is that he is a vain glorious fool of a vulgar and abusive turn of mind.

The complainant has unfortunately for himself indulged in his *Saiva Samaya Sarabham* in plentiful abuse of all that is sacred to Vaishnavites. The abuse is at times very vulgar. The charge of vain gloriousness is defended by the accused on the ground that the complainant has in several passages of his book revealed a very good opinion of himself notably where he has tried to make out that Krishna preached the *Gita* believing that he was a Siva. The accusation of foolishness does not merit serious consideration all Saivite doctrines are foolish as in the estimation of the accused as all Vaishnavite doctrines are foolishness to the complainant.

Then comes the allegations that the complainant is a wandering impostor and an atheistic reviler.

The complainant is, as has been said at the beginning, a Saiva ascetic. The term "wanderer" has reference merely to the fact that he has given up all earthly ties. The term as applied to the complainant is disparaging and was intended to be incomplimentary. But no one will on account of the use of this word by the accused think any the less of the complainant.

Similarly the term "impostor" (*droghi*) read in the context signifies nothing more than that under a show of deep learning the complainant has been promulgating Saiva doctrines which in accused's opinion are highly pernicious and that with the same show of learning he has cast aspersions on holy Vaishnavite doctrines. The term "*droghi*" is moreover one which the complainant has on page 71 of his book applied to Vaishnavite teachers. The reasons which justified the complainant to apply such an expression to men revered by Vaishnavites would equally justify the application of a similar term by Vaishnavites to the complainant.

The term "atheist" has been used after considerable hesitation to interpret the word "Pashanda" which has been used by the accused. "Heterodox" may perhaps be the more correct word. In defence of the application of this word to the complainant, the accused points out that in the *Saiva Samaya Sarabham* the complainant has made use of exactly the same expression in referring to Vaishnavites, sauce for the goose is sauce for the gander.

The comparison of the complainant to Hiranya, Ravana, Duryodhana and the like is expressly limited by the accused to the fact that they, like the

Kumaragurudasa Swamigal v. Krishnaswami Mudaliar.

complainant, evinced a dislike for Vishnu. Similarly, the complainant has been classed among the Asuras, Rakshasas and Paisachas merely because of his religious views. And it is also because of these views that it is said that the complainant will ultimately go to hell. And these are very unseemly and violent expressions of sectarian views ; but they are not defamatory.

On the whole, therefore, I do not consider that the complainant has been defamed by the publication of the *Parabrahma Tatva Vilakkam*, the work of the first accused.

He therefore acquitted the accused, and the petitioner applied to the High Court in revision.

V L. Ethiraj and *V Viswanadha Sastri* for petitioner.

F. S. Vaz for respondents.

The Court made the following

ORDER :—This is an application to revise an order of acquittal passed by the Presidency Magistrate. A book was written by the 1st accused as a reply to a book written by the complainant. Both the books deal with highly controversial religious matters. In expressing his opinion, the 1st accused has no doubt used very violent expressions, but taking them along with the context in which they appear, I agree with the Magistrate that they cannot be considered defamatory. I do not think that the personal character or respectability of the complainant is in any way assailed by the use of the expressions complained of. I dismiss this application.

T. S. V *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

Kattamanchi Krishna Reddi *Appellant* (2nd defendant)*

v.

Thota Ramakrishnayya Chetty *alias* Ramakrishnan, by his agent Gangojamma, amended as per order of the High Court, dated 31st August, 1923 *Respondent (Plff.).*

Krishna Reddi v. Ramakrishnayya Chetty.

Madras Regulation X of 1831, *S.* 2—*Sale of minor's estate—"Regular course of inheritance"—Meaning of—If excludes survivorship—Madras Revenue Recovery Act* (*II of* 1864), *S.* 63—*Effect of—Unregistered landholder.*

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*Appeal No. 140 of 1923 21st August, 1924.

Krishna Reddi v. Ramakrishnayya Chetty.

S. 2 of Madras Regulation X of 1831 is wide enough to cover property belonging to a joint Hindu family and devolving on a minor by the operation of the law of survivorship. Regulation X of 1831 applies to all minor owners of property, whether registered or not. S. 63 of Madras Act II of 1864 does not limit the application of the Regulation to the case of registered owners of property who are minors. *Swaminadha Aiyar* v. *Govindaswami Padayachi*, I. L. R. 41 M. 733 referred to.

Appeal against the decree of the District Court of Cudappah in O. S. No. 30 of 1922.

A. Krishnaswami Aiyar for appellant.

S. T Srinivasagopalachari for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.* :—In this appeal, the 2nd defendant is the appellant and the plaintiff, the respondent. The suit was filed to declare the sale of the Shrotriem village of Vasudevapuram in May, 1911, for arrears of revenue, void on the ground that it was made during plaintiff's minority and therefore opposed to Regulation X of 1831.

The plaintiff alleged that the village originally belonged to the plaintiff's family as joint family property and that it fell to plaintiff's father's share in a partition. When the father died in 1905, the plaintiff became sole owner. The 2nd defendant admitted that the village belonged to the joint family consisting of plaintiff's father and others but denied the partition and that the plaintiff became the sole owner in 1905. The first issue was framed with reference to this plea.

In appeal, he wishes to argue that the property did not belong exclusively to plaintiff's family. According to his present suggestion, the plaintiff's family owned only 3|14ths share in the village and the appellant filed new documents to substantiate his plea. Having regard to his admission in the written statement, we do not think this plea should be allowed to be raised at this stage. We say nothing on the merits of this plea.

The partition must be found to be true as plaintiff's first witness, whom we see no reason to disbelieve, proves it.

The next point argued is that the sale is not void. The argument consists of two parts—(1) That Regulation X of 1831 does not apply. (2) The operation of the Regulation is partly cut down by S. 63 of Act II of 1864.

Krishna Reddi v. Ramakrishnayya Chetty.

Ramesam, J.

Taking up the first point, the appellant's contention is that S. 2 of the Regulation applies only to cases where the minor owner obtained the property by ' regular course of inheritance ' and this does not include cases of survivorship in a joint family. In the present case, the village was not plaintiff's father's self-acquisition.

I think S. 2 itself throws some light on the words ' regular course of inheritance.' The word ' accession ' occurring at the end of the section seems to have been used in the same sense as ' inheritance.' This is not an unnatural use of the word [*vide* ' inherit, ' ' inheritance ' and ' inheritor ' in Stroud's Judicial Dictionarf and my judgment in *Sivarama Aiyar* v. *Gopalakrishna Chettiar* (1) referring to *Watkins* v. *Frederick* (2).]

The word ' inheritance ' occurs in Regulation IV of 1822 (preamble), Regulation V of 1804 (S. 3), and Regulation III of 1802 (S. 16) and it is difficult to hold in these instances that ' inheritance ' does not include ' the taking of property of survivorship.' I think it is a fair inference that in S. 2 of Regulation X of 1831, the word is used in the same general sense.

It is next contended that S. 63 of Act II of 1864 saves the operation of Regulation X of 1831 only in respect of minor landholders. In the present case, the village was not registered in the name of plaintiff's father or plaintiff and the plaintiff is not a minor landholder. But the words in the sentence are ' minors and other disqualified landholders.' The word ' minors ' includes registered and unregistered owners and this may be the reason why the word ' other ' is used with reference to disqualified landholders. No doubt the results would have been the same even if the word 'other' is omitted; but the two parts of the phrase would have been overlapping. We have not got ' minor and other ' but ' minors ' and we do not see any reason to cut down the natural meaning of the words as they stand. It seems to me that the object of the words beginning with ' in respect of ' was to compendiously refer to the subject-matter of Regulations V of 1804 and X of 1831 so far as it was pertinent.

In *Swaminadha Iyer* v. *Govindaswami Padayachi* (3) the Regulation was applied to a minor whose name was not regis-

1. (1924) 47 M L J 337. 2. 11 H L C 358.
3. (1918) I L R 41 M 733 : 34 M L J 536 (F B).

Krishna Reddi v. Ramakrishnayya Chetty.

Ramesam. J.

tered. It is true that the ground of the decision was that the Government ought to find out the correct heir of the deceased person and the responsible officer should enter his name in the proper register. Whatever the ground may be, it must be conceded that the decree is inconsistent with the appellant's contention based on S. 63 of the Revenue Recovery Act. In *Sangapally Lakshmayya* v. *Intoory Bolla Reddy* (4), it is not clear whether the 1st defendant's name was registered or not. I am, therefore, of opinion that Regulation X of 1831 applies to all minor owners of property whether registered or not.

The appeal fails and is dismissed with costs.

Reilly, J.

Reilly, J. :—I agree that the appeal must be dismissed. Plaintiff succeeded before the District Judge on the ground that the sale was held while he was a minor for arrears which accrued after his accession to the property and was therefore in contravention of Regulation X of 1831. For defendant 2, the transferee of the auction-purchaser, it is contended that after the enactment of the Madras Revenue Recovery Act, 1864, the special protection given to minors by Regulation X of 1831 was preserved only by S. 63 of the Act and that in that section the word " minors " includes only minor landholders and plaintiff is not a landholder within the meaning of the Act, never having been registered as such. I agree with Mr. Srinivasagopalachari, who appears for plaintiff, that " minors " in the phrase " minors and other disqualified landholders " in S. 63 cannot be treated as equivalent to " minors and other disqualified landholders " so as to make the word " minors " mean " minor landholders." The effect of S. 63 in my opinion is to leave the special rights conferred on minors by Regulation X of 1831, whether they are technically landholders or not, unaffected by the Act.

We have therefore to see whether plaintiff comes within the protection of Regulation X of 1863. It is admitted that his right to the property in question is that of the last surviving member of the joint family of his father and himself. Can it be said within the words of the Regulation that the property " descended to him by the regular course of inheritance "? Strictly those words are far from appropriate to property taken by survivorship, which has not really descended to plaintiff and to which he is not heir. But I agree with my learned brother

4. (1902) I L R 26 M 385 : 13 M L J 129.

Krishna Reddi v. Ramakrishnayya Chetty.

Reilly, J.

that it is probable that in 1831, when the true incidents of survivorship were less clearly recognised than now, those who enacted Regulation X of 1831 intended the words quoted to include property taken by survivorship by a minor who was the last surviving member of a joint-family. The property of such a minor would need protection no less than that of a minor who took as heir. Moreover, the use of the word " accession " at the end of the sentence points to something not confined strictly to inheritance by an heir being intended. I agree that the sale was in contravention of the Regulation and that the appeal must be dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice,* AND MR. JUSTICE SRINIVASA AIYANGAR.

K. R. Swaminatha Aiyar and another *Appts.** *(Plffs.)*

v.

A. Ramier and others *Respts. (Defts.)*

Swaminatha Aiyar v. Ramier.

Specific Relief Act, S. 42, Proviso—Consequential relief—Suit for declaration of plaintiffs' right as trustees of a Hindu temple and for injunction—Prayer for possession of temple and its properties if necessary.

A suit by plaintiffs for a declaration that they are lawful trustees of a Hindu temple and its endowments, for a direction that defendants who claimed to be trustees should be made to restore the office of trustee to them, and for an injunction restraining the defendants from interfering with the exercise by the plaintiffs of their duties as trustees, does not offend against the proviso to S. 42 of the Specific Relief Act and the plaintiffs are not bound to sue for possession of the temple and its properties especially where the tenants of the properties are willing to pay the rents to whomsoever is the proper trustee.

Kunj Behari v. *Keshavlal Heralal,* (1904) I L R 28 Bom 567 ; *Ramadoss* v. *Hanumantha Rao,* (1911) I L R 36 M 364 followed.

Ratnasabapathi Pillai v. *Ramaswami Aiyar,* I L R 33 M 452 distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 33 of 1918.

The Advocate-General and *T S. Ramaswami Aiyar* for appellants.

T R. Ramachandra Aiyar, *N. A. Krishna Aiyar* and *S. Panchapagesa Aiyar* for respondents.

L. R. Narayanaswami Aiyar for 1st respondent.

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*Appeal No. 356 of 1921. 25th July, 1924.

Swaminatha Aiyar v. Ramier.

Spencer, Offg. C. J

The Court delivered the following

JUDGMENTS :—*Officiating Chief Justice* :—The plaintiffs brought this suit for a declaration that they and the 1st defendant were the lawfully appointed trustees of the temple of Sri Umamaheswaraswami in Thirumalam village of Mayavaram Taluk ; and they prayed for a direction that the defendants 2 and 3 should be made to restore the office of trustee to them and for an injunction restraining them from interfering with the exercise by the plaintiffs and 1st defendant of their duties as trustees. They valued the relief asked for at Rs. 5,500. The basis of their title was the order of the Devasthanam Committee made in January, 1916, appointing the plaintiffs and 1st defendant as trustees. The 4th and 7th issues in the suit raised the question as to the Devasthanam Committee's jurisdiction and the rights of the plaintiffs derived from their order of appointment.

The lower Court, without deciding these important issues, dismissed the suit as not maintainable on the ground that the plaintiffs did not ask for possession of the temple and its properties, quoting the authority of *Rathnasabapathi Pillai* v. *Ramaswami Aiyar* (1). In my opinion, the Subordinate Judge should not have dismissed the suit upon this preliminary point without trying the other issues. In *Kunj Behari* v. *Keshavlal Heralal* (2), Sir Lawrence Jenkins, C. J., quotes S. 42 of the Specific Relief Act and points out that nothing is said about the dismissing of a suit in the proviso which is in these terms " Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." In the present litigation the plaintiff is asserting his right to an office of trust. He does not claim any proprietary interest in the temple. As I pointed out in the order of reference in *Rajagopala Naidu* v. *Ramasubramania Aiyar* (3) it would be preposterous that a trustee, claiming only a right to administer a certain trust, should be compelled to sue for physical possession of all the trust properties against defendants who claim only a similar right of management and that he should be made to pay stamp duty calculated on the total value of the endowments of the trust, which were in that case valued at two lakhs of rupees.

1. (1910) I L R 33 M 452 : 20 M L J 301.
2. (1904). I L R 28 B 567 at 571.
3. (1923) 45 M L J 274 (F B).

Swaminatha Aiyar v. Ramier.

Spencer, Offg. C. J.

In the case of temples, owning very extensive and valuable lands, of which there are many in this Presidency, no one would undertake the duties of a public trustee if such a burden were placed on him before entering his office. In the present instance the plaintiffs, while claiming the restoration of the office to themselves and the 1st defendant, asserted in their plaint that the ownership of the temple was vested in the deity, that they had only a right of managing the temple affairs, and that the temple lands were in the possession of tenants who would attorn to whomsoever might be declared to be the lawful trustees. The 1st defendant set up the right of the villagers in contradistinction to the Devasthanam Committee's right to manage this temple. The 2nd and 3rd defendants denied the right of the Devasthanam Committee to interfere in the affairs of this temple, denied also that the ownership of the temple vested in the deity, and set up a right of adverse possession as against the Devasthanam Committee. The lower Court omitted to decide issue 5 which relates to the claim of the defendants that the Committee's right, if any, had been lost by adverse possession. The maintainability of the suit must depend upon the allegations in the plaint, and these allegations have not been disproved by evidence. *Rathnasabapathi Pillai* v. *Ramaswami Aiyar* (1) relied on by the Subordinate Judge was a suit against the Devasthanam Committee by a plaintiff claiming to be a trustee to recover damages for wrongful dismissal. In his plaint he mentioned that the defendants 8 and 9 had illegally taken possession of the temple lands and leased out the fishery in the tank and collected rent. The plaintiff in that case having, for reasons best known to himself, combined two actions in one, namely one action against the Temple Committee for the restoration of his trustee's office and for damages, and a second action for the recovery of the trust properties against persons who had wrongfully dispossessed him of such property, was bound to ask for the relief of possession of the temple properties to which he asserted a present right of possession. On the allegations in the plaint in that suit it may have been right to require the plaintiff to add a prayer for possession of the lands and if he refused to do so, his suit might have been dismissed. But he was not bound to sue for possession of the lands before he was restored to office. If he had chosen to strike out from his plaint his statement as to

1. (1910) I L R 33 M 452 : 20 M L J 301.

Swaminatha Aiyar v. Ramier.

Spencer, Offg. C. J.

the part played by defendants 8 and 9, he might have waited till he was restored to his office of trustee, and he might then have brought a separate suit on behalf of the trust to recover the trust properties which had been wrongfully alienated. The facts of the present case closely resemble those in *Ramadoss* v. *Hanumantha Rao* (4). In that case also it was stated in the plaint that the temple properties were in the possession of tenants who were ready to pay rent to whomsoever held the office of Dharmakartha, and the learned Judges, adopting the reasoning of Sir Lawrence Jenkins in *Kunj Behari* v. *Keshavlal Heralal* (2), held that on the allegations in the plaint, which had not been traversed, the suit was maintainable and that the proviso to S. 42 of the Specific Relief Act was no bar to its maintainability. In my judgment, that case was rightly decided, although the difference between Rs. 10 and Rs. 2,600 in the plaintiff's valuation to the injunction does not really affect the question. I think that we should follow it, as it is in accordance with *Kunj Behari* v. *Keshavlal Heralal* (2) which correctly expounds the effect of the proviso to S. 42 of the Specific Relief Act. The question whether this temple is under the control of the Devasthanam Committee or belongs to the villagers will have to be decided, also whether the right of the Devasthanam Committee has been lost on account of adverse possession by any of the defendants. Also it must be decided whether one or two trustees can act alone if the appointment was of three trustees and one does not accept the office. The appeal is allowed. The order dismissing the suit is set aside and the suit is remanded for trial on its merits. Costs of the appeal to be borne by the respondents (defendants 1 to 3). Costs in the lower Court to abide and follow the result of the suit. Appellants are entitled to refund of Court-fee on this appeal.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree with the judgment of my Lord the Chief Justice. The question with regard to the maintainability of the suit as framed was tried originally by the learned Subordinate Judge as a preliminary issue. For some reason not clear on the record, instead of coming to a decision on the issue, he called upon the parties to proceed with the trial of the suit adducing evidence and ultimately, after the whole hearing was over, dismissed the suit on the

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2. (1904) I L R 28 B 567. 4. (1911) I L R 36 M 364 : 21 M L J 952.

Swaminatha Aiyar v. Ramier

Srinivasa Aiyangar, J.

preliminary ground originally raised regarding the maintainability of the suit itself, holding that it was not maintainable.

When the question is whether a suit as framed is maintainable or not, what has to be looked to is the plaint and the plaint alone. Reading the plaint in this case, it is clear that it is both in form and in substance a suit for the recovery of an office. The case of *Rathnasabapathi Pillai* v. *Ramaswami Aiyar* (1) was relied upon by Mr. T. R. Ramachandra Aiyar, the learned Vakil for the respondents, as an authority for the position that all suits for an office are suits for a declaration and that in all such suits, therefore, if the plaintiffs should be able to seek by way of further relief possession of the property relating to the office and omit to do so, the suit would not be maintainable. It is possible, and perhaps also easy, to frame a suit which is in substance one for an office as a suit in form only for a declaratory decree and injunction. If in such cases any question should arise with regard to the frame of the action, it would necessarily follow that the suit may be looked upon merely as a suit for declaration, and all the rules applicable to declaratory suits would also be applicable thereto. But a suit for an office is a well-known form of action, and, from the earliest times all the Courts in this country, and their Lordships of the Judicial Committee, have frequently referred to such suits.

In the explanation to S. 9, Civil Procedure Code, the legislature itself has referred to a suit for an office as contradistinguished from a suit in respect of property. Suits for property so called are themselves really suits only for the establishment of certain rights over property. An office, though intangible, is something recognised by the law which attaches to the office certain rights and duties. In the case of *Rathnasabapathi Pillai* v. *Ramaswami Aiyar* (1), it is clear not only that the action was in form for a declaratory decree but that the question whether, though in form the suit was for a declaration, it was not in substance a suit for an office does not appear to have been either argued or considered. The learned Judges took the form of the action as they found it and laid down the law as applicable thereto. Though the decision is undoubtedly an authority for the position that the plaintiff in a declaratory suit should also ask for possession if

1. (1910) I L R 33 M 452 : 20 M L J 301.

Swaminatha Aiyar v. Ramier.

Srinivasa Aiyangar, J.

he is able to ask for such possession, it is scarcely an authority for the proposition contended for that, when in form a suit is for an office, it ought to be deemed to be merely a suit for a declaration and dealt with accordingly.

The real difficulty with regard to the whole question would appear to have arisen by certain observations of their Lordships in the case of *Ramadoss* v. *Hanumantha Rao* (4).

The real ground of decision, as I understand it, of *Ramadoss* v. *Hanumantha Rao* (4) is that when the suit is for an office, the plaintiff need not ask for possession of properties relating to the office. But their Lordships in their anxiety to distinguish the case before them from the case of *Rathnasabapathi Pillai* v. *Ramaswami Aiyar* (1) have referred to certain circumstances in the case before them. These were that, in the case with which they were dealing, the injunction was valued at a substantial amount. It is difficult to see what the valuation of the relief has to do with the frame of the action except as indicating that, as a suit for an office, it is capable of independent valuation by the plaintiff. The second ground of distinction by the learned Judges referred to is that it was stated in the plaint before them that the temple properties were in the possession of tenants who will pay the rents to whomsoever holds the office of Dharmakartha and that such statement was not traversed in the written statement and should therefore be accepted as correct.

Their Lordships proceed to say that if, therefore, the plaintiff gets possession of the office of Dharmakartha, the tenants will pay the rents to him, and the plaintiff will obtain possession to which he is entitled, that is, the right to collect rent. It is difficult to understand how the mere willingness of the tenants to attorn to the rightful holder of the office can affect the question whether or not the plaintiff is able to ask for further relief by way of possession. I do not understand their Lordships to have signified that in such circumstances it would be impossible for the plaintiff to ask further relief by way of possession or such possession as it is susceptible of.

The third ground of distinction relied upon was that, in the case of *Rathnasabapathi Pillai* v. *Ramaswami Aiyar* (1),

1. (1910) I L R 33 M 452 : 20 M L J 301.
4. (1911) I L R 36 M 364 : 21 M L J 952.

Swaminatha Aiyar v. Ramier.

Srinivasa Aiyangar, J.

and the cases relied on in that judgment, possession of the property may be said to have been adverse to the plaintiff and would have continued to be adverse even after the plaintiff had obtained the declaration sued for.

It is very doubtful if such a ground of distinction is warranted by the terms of the proviso in S. 42 of the Specific Relief Act. But their Lordships proceed further referring to the case of *Kunj Behari Prasadji Purushotham Prasadji* v. *Keshavlal Heralal* (2) and quote with approval the observation of the Chief Justice, Sir Lawrence Jenkins, "How would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up ?" Further on, the learned Judges observe as follows :—"The lands attached to a temple do not belong to the Dharmakartha, who is merely the manager, but belong to the temple or idol, the Privy Council having held that an idol may be regarded as a juridical person capable of holding property."

As I read and understand therefore the case in *Ramadoss* v. *Hanumantha Rao* (4) the real principle underlying that decision is based exactly on the considerations so clearly and forcibly set out by the present Officiating Chief Justice in his order of reference to a Full Bench reported in the case of *Rajagopal Naidu* v. *Ramasubramania Aiyar* (3). Further, it is significant that, whereas the learned Judges that decided the case of *Ramadoss* v. *Hanumantha Rao* (4) approved of the case of *Kunj Behari Prasadji Purushotham Prasadji* v. *Keshavlal Heralal and others* (2), the learned Judges who decided the case of *Rathnasabapathi Pillai* v. *Ramaswami Aiyar* (1) have disapproved of the same.

I therefore prefer to regard and follow the case of *Ramadoss* v. *Hanumantha Rao* (4) as a direct authority for the position that, in a suit for an office, no possession of the properties relating to the office need be asked.

I therefore respectfully agree to the order proposed.

A. V. V. *Appeal allowed.*

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1. (1910) I L R 33 M 452 : 20 M L J 301.
2. (1904) I L R 28 B 567. 3. (1923) 45 M L J 274 (F B).
4. (1911) I L R 36 M 364 : 21 M L J 952.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

S. Govindasamy Odayar *Appellant** (*Petitioner*)

v.

The Union Bank, Ltd., Kumbakonam, by its Director, Singaram Chettiar *Respondent* (*Respondent*).

Govindasamy Odayar *v.* The Union Bank, Ltd., Kumbakonam

Civil Procedure Code, Ss. 47 and 135—Arrest in execution of decree—Exemption under S. 135, Civil Procedure Code, claimed by judgment-debtor—Appeal Arrest in execution of two decrees—Legality of.

Where a judgment-debtor arrested in execution of a decree claims exemption from arrest under S. 135, Civil Procedure Code, and the Court negatives his contention, the order is one under S. 47, Civil Procedure Code, and is appealable.

Where a judgment-debtor has been arrested in execution of a decree and brought before the Court, he is not at that time exempt from arrest in execution of another decree held by a different decree-holder.

Appeal against the order, dated the 28th November, 1922, of the District Court of West Tanjore at Tanjore in E. A. No. 665 of 1922 in E. P. No. 128 of 1922.

K. V. Krishnaswami Aiyar for appellant.

K. Bhashyam Aiyangar and *K. Narasimha Aiyangar* for respondent.

The Judgment of the Court was delivered by

Wallace, J.

WALLACE, J. :—A preliminary point is raised by respondent, *viz.*, whether an appeal lies. Appellant contends that the order is one under S. 47 of the Code of Civil Procedure as he is challenging the legality of his arrest. Respondent contends that as he is only challenging the mode of executing the warrant, the case does not come under S. 47. There is no direct authority on the point. As at present advised, we incline to hold that the appeal is valid.

On the merits we cannot see that appellant is entitled to the benefit of S. 135 of the Code of Civil Procedure. He was arrested at 7 P. M. on the 25th November, 1922. He was then in custody of the Court's officers having been arrested under another decree. Appellant contends, (*a*) that at the time of his arrest he was attending the Court for the purposes

*A. A. O. No. 403 of 1922. 11th July, 1924.

of execution of the first decree, (*b*) that a judgment-debtor cannot be the subject of two arrests at the same time. As to (*a*) we can find no order which directed appellant to be in attendance on the Court at 7 P. M. on the 25th November, 1922. As to (*b*) we see no reason why when there are two decrees held by different decree-holders against the judgment-debtor, he should not be arrested under each.

Govindasamy Odayai v. The Union Bank, Ltd., Kumbakonam.

Wallace, J.

We find that appellant was under no legal obligation to be present before the Court at the time of his arrest. He is not therefore entitled to the benefit of S. 135, and the order appealed against is correct.

The appeal is dismissed with costs. The security given by appellant in the District Court under order of this Court will enure until the decree-holder moves the District Court further in the matter of this execution.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Chathoth Parkum Kareth Kombi Kunhammad Kutty *Appellant** (*1st defdt.*)

v.

Parambath Chathankandi Enna Ponnambilath Parapravan Cheria Mammad and others *Respondents* (*Plaintiffs and 2nd defendant and nil*).

Malabar Law—Mahomedans following Marumakkatayam law—Gift to daughter—Incidents of tarwad property.

Kunhammad Kutty v. Parapravan Cheria Mammad.

A Mahomedan of North Malabar governed by the Marumakkatayam law being the sole survivor and senior member of his tarwad made a gift of property to his daughter with these recitals "In future, except for you and your offspring (*santanam*) there is no claim, concern, or right of entry for me over this *paramba*. You and your *santanams* should hold the said *paramba* in possession and enjoy the same as your *jenmom*." In the earlier portion of the gift deed the donor stated that he gifted the property "to you" (in singular) referring to his daughter. *Held,* on a construction of the gift deed that the gift enured to the benefit of the donee and her children with the incidents of *putravakasam* property. *Kalliani Amma* v. *Govinda Menon,* (1911) I L R 35 M 648 22 M L J 23 followed.

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*S. A. No. 228 of 1921. 7th February, 1924.

Kunhammad Kutty v. Parapravan Cheria Mammad.

Second Appeal against the decree of the District Court of North Malabar in A. S. No. 373 of 1919 preferred against the decree of the Court of the Additional District Munsif of Badagara in O. S. No. 329 of 1918 (O. S. No. 331 of 1918 on the file of the Court of the District Munsif of Nadapuram).

T. R. Ramachandra Aiyar for appellant.

C. V Anantakrishna Aiyar for 1st respondent.

B. Pocker for 6th respondent.

The Court delivered the following

JUDGMENT :—The decision in this appeal turns on the interpretation to be put upon Ex. B, a gift deed executed by one Parapravan Bavotti Haji in favour of his daughter. The donor was a Mahomedan of North Malabar admittedly following the Marumakkatayam Law prevalent in those parts and he was the sole survivor and senior member of his tarwad.

Ex. B recites that he gifts the property " to you " (in the singular) and then goes on to say that " in future except for you and your offspring (*santanam*) there is no claim, concern or right of entry for me over this *paramba*. .you and your *santanams* should hold the said *paramba* in possession and enjoy the same as your *jenmom.*" Both the lower Courts have held that the form and circumstances of the gift necessarily lead to the inference that the gift was not for the donee's exclusive benefit but for her children also, and that the property gifted is therefore *putravakasam* property belonging to the donee's *tavazhi.*

The first defendant in this appeal challenges that finding. The point for determination is whether this was a gift to the daughter exclusively or a gift to her as the head of a *tavazhi* formed of herself and her children.

Various reported and unreported cases bearing on this question of Marumakkatayam Law have been cited to me, relating to gift deeds or bequests more or less analogous to the one in suit. The general test is, having regard to the presumed knowledge of local customs by the donor or testator and the manner of holding property in the community of the donor or testator and having regard to the terms in which they have expressed their intention in their deeds of gift or bequests, what was their real intention. Generally it has been held that, unless there are apt words to indicate that the intention was that the property should be held in any manner

different from the usual manner in which such property is held —apt words to imply that the property is to be held with powers larger than usual—then, it must be taken that the intention was that the property should be held in the usual manner.

Thus in cases where the gift or bequest has been to a woman and her children and there is no further expression of intention as to how it should be held, no apt words to express the gift of an absolute alienable estate—it has been held that they took it and held it as a woman and her children usually would hold under the Marumakkatayam Law, that is, as a legal corporate unit or *tarwad*. [See *Kunhacha Umma* v *Kutti Mammi Haji* (1), *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* (2) and *Naku Amma* v. *Raghava Menon* (3)]. When a gift or bequest is to a woman ***and her children*** with words which might be taken to import an intention to confer an absolute estate, it has been held that, since the usual manner of holding property by a woman and her children under Marumakkatayam Law is in the form of a *tavazhi*, it must be taken that the donees held the property in that way. [See *Chakkara Kannan* v. *Kunhi Pokker* (4) following *Kunhacha Umma* v. *Kutti Mammi Haji* (1)]. It may be noted that the bequest in *Chakkara Kannan* v. *Kunhi Pokker* (4) was a bequest to children only.

In *Pattatheruvath Pathumma* v. *Mannam Kunnizil Abdulla Haji* (5) the suit property, as I have verified with reference to the original records, had been purchased by a Mahomedan husband in the name of his wife only. The husband had previously given a house to his wife and children, which, however, was not part of the property in suit and the question was to whom the property in the suit descended on the wife's death. The High Court held in that case that the intention was that the purchase in the name of the wife was intended for the children also, and followed *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* (2) ; that is, they took it with the incidents of *tarwad* property. There was no question there of apt words in any deed of gift or bequest. The case in *Kalliani Amma* v. *Govinda Menon* (6), as I have also

1. (1892) I L R 16 M 201 : 2 M L J 226. 2. (1906) I L R 29 M 322.
3. (1912) I L R 38 M 79. 4. (1915) I L R 39 M 317 : 21 M L J 481 (F B)
5. (1907) I L R 31 M 228 18 M L J 16.
6. (1911) I L R 35 M 648 : 22 M L J 23.

Kunhammad. Kutty v. Parapravan Cheria Mammad.

verified from the records, was a case of a gift to a woman only with a recital that "besides the jewels and vessels which I acquired out of my own funds and which I have given to you and your *santanams* for enjoyment permanently and for ever I have now given properties" of which particulars are given ; and the document goes on to say "I have resolved that you and your *santanams* should be in enjoyment for ever along with me as long as I live and *in proprium* thereafter, and that to it my heirs shall have no right." It was there held that that was really a gift to the woman *and her children* and *Kunhacha Umma* v. *Kutti Mammi Haji* (1) was followed.

Besides the authorised reported cases, I have been referred to two cases, *Kuyyathil Kandan Kutty* v. *Vyalpath Parkum* (7) and *Paru Ammal* v. *Itticheri Amma* (8). The former was a case of gift by a Marumakkatayam donor to his nieces with no apt words to express an absolute estate and *Kunhacha Umma* v. *Kutti Mammi Haji* (1) was followed by Kumaraswami Sastri, J., whose judgment was upheld in Letters Patent Appeal No. 19 of 1916. The other case was one of a bequest in which the words 'with absolute rights of alienation' were used and it was there held that the legatee took an absolute estate.

On consideration of these cases I am of opinion that the present document of gift bears most resemblance to that in *Kalliani Amma* v. *Govinda Menon* (6). There are here no apt words conferring absolute rights of alienation. The gift is to the woman only but the enjoyment is to be by her and her *santanams* and I do not think any real distinction can be drawn between the present document and that of *Kalliani Amma* v. *Govinda Menon* (6) merely on the ground that the donor in the latter cases had already given other properties to his wife and *santanams*. There is nothing in the suit document to take it out of the ordinary category of gift to a woman under Marumakkatayam Law of property to be enjoyed by her and her *santanams*, that is to say, to be enjoyed with all the incidents of tarwad property.

I therefore agree with the lower Courts that this property is *puttravakasam*. I am not prepared to interfere, and I dismiss the appeal with costs of the 1st respondent.

A. V. V. *Appeal dismissed.*

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1. (1892) I L R 16 M 201 : 2 M L J 226.
6. (1911) I L R 35 M 648 22 M L J 23.
7. (1915) 32 I C 107.
8. (1915) 32 I C 459.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Kasivasi Chidambara Swamigal — *Appellant** (*Plaintiff*)

v.

Ramakrishna Reddiar and others — *Respondents* (*Defendants Nos.* 3, 4, *and* 2).

Chidambara Swamigal v. Ramakrishna Reddiar.

Minor—Guardian—Contract for sale of immoveable property—Enforceability—Subsequent sale to another for higher price—Rights of vendee under prior contract—Specific performance.

Under the Hindu Law it is competent to the guardian of a minor to enter into a valid contract for the sale of his immoveable property for the purpose of discharging debts of the minor's father for which the property in the minor's hands would be liable. *Ramajogayya* v. *Jagannadhan*, (1918) 36 M L J 29 : I L R 42 M 185 (F B) relied on.

The contract for sale by the guardian if entered into in the interests of the minor and for a proper price, can be enforced against a subsequent purchaser of the property with notice, even though the latter has bought it for a higher price than that stipulated under the prior contract. *Chhittar Mal* v. *Jagan Nath Prasad*, I L R 29 A 213 distinguished.

Second Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 33 of 1921 (A. S. No. 187 of 1920 on the file of the District Court, South Arcot) preferred against the decree of the Court of the District Munsif of Chidambaram in O. S. No. 319 of 1919.

M. Patanjali Sastri for appellant.

N. S. Srinivasa Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The main question argued in this second appeal is whether the contract entered into by the guardian of a minor for the sale of immoveable property belonging to the minor could be specifically enforced. The plaintiff contracted to buy a portion of the minor's property for Rs. 1,150. Two months after, the property was sold for Rs. 1,500 to the 3rd defendant. The plaintiff has brought the suit for the purpose of enforcing specific performance of the contract in his favour and the 3rd defendant resists the suit. The District Munsif gave a decree in favour of the plaintiff and the Subordinate Judge has reversed the judgment and has dismissed the plaintiff's suit.

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*S A. No. 51 of 1922. — 9th July, 1924.

Chidambara Swamigal v. Ramakrishna Reddiar.

The question in this case is whether the contract by the guardian on behalf of the minor could be specifically enforced. Mr. Patanjali Sastri who appears for the appellant relies upon the case reported in *Ramajogayya* v. *Jagannadhan* (1). In that case the opinion of the majority was that no decree should be passed against the minor's estate on a contract entered into on his behalf by the guardian under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. In this case the minor is a Hindu and the guardian is his mother. The contract to sell a portion of the property was in discharge of a debt incurred by the father. The question whether she could sell a portion of the property of the minor for discharging a debt due by the minor's father has to be decided with reference to *Ramajogayya* v. *Jagannadhan* (1). It is urged on behalf of the respondent that the question of necessity has not been gone into. The 3rd defendant who contested the suit did not raise the question as to the necessity for the sale. Evidently it did not suit his purpose to raise such a question for he himself is a purchaser from the guardian, and so he cannot now reasonably complain that the question of necessity was not gone into. As it was not specifically raised in the pleadings, the District Munsif rightly disallowed the questions as to necessity. The Subordinate Judge based his decision mainly relying upon the decisions referred to in *Ramajogayya* v. *Jagannadhan* (1). Whatever may be the effect of those decisions, I am bound to follow the decision reported in *Ramajogayya* v. *Jagannadhan* (1). According to that decision a decree could be passed in certain circumstances against the minor on a contract entered into by the guardian. The contract in favour of the plaintiff is not impeached on the ground of fraud or collusion or on any other ground which would be a proper defence to an action of this kind. The respondent's vakil urged that this is a case of specific performance and no specific performance of the contract should be given when the estate of the minor is likely to suffer, and his contention was that as the 3rd defendant was able to pay a better price the contract in favour of the plaintiff should not be enforced, and relied upon *Chhittar Mal* v. *Jagan*

1. (1918) 36 M L J 29 · I L R 42 M 185 (F B).

Nath Prasad (2). In that case, the learned Judge has held that it was not proper that specific performance of a contract should be granted in a case where the minor's estate was likely to suffer, but that case is no authority for refusing relief where there is a valid contract and at the time when such contract was made there were no circumstances which could invalidate it for the simple reason that somebody else is prepared to offer a better price. In a case in *Lal Gopal Datta Chowdhury* v. *Khorooriah Majozilla Zemindary Syndicate, Ltd.* (3), a Bench of the Allahabad High Court held that the case in *Chhittar Mal* v. *Jagan Nath Prasad* (2) was not an authority for holding that, when a valid agreement had been lawfully entered into on behalf of a minor and was to the minor's benefit, it could be repudiated if the guardian subsequently found he could obtain more. To hold that a Court should not grant specific performance of a valid contract if better terms are forthcoming would be putting a premium upon offers of a better price a long time after the contract is entered into. I do not think that in this case the guardian acted against the interests of the minor at the time when the contract in favour of the plaintiff was entered into. If any evidence was forthcoming that the contract was not a proper contract, or that there were other circumstances which could in any way invalidate or go to show that the minor's guardian was not acting as a free agent, certainly the Court would not be well advised in granting specific performance. But no such case was put forward either on behalf of the minor or on behalf of the 3rd defendant.

In the result the second appeal is allowed and the plaintiff's suit is decreed with costs throughout. The plaintiff will pay the whole of the price less Rs. 100 into Court within 14 days from to-day. If he fails to do so, his suit will stand dismissed with costs throughout.

A. V. V. *Second appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Nalannad *alias* Palliprom *alias* Thattukkasseri Manakkal Narayanan Nambudri and another *Appellants* in S. A. No. 7 of 1922 (Respondents in S. A. No. 302 of 1922) (Defendants 2 and 3)*

v.

Kanhirampare Ravunni Nair and another *Respondents in S. A. No. 7 of 1922, and Appellants in S. A. No. 302 of 1922 (Plaintiffs).*

Narayanan Nambudri *v.* Ravunni Nair.

Malabar Law—Nambudris—Law applicable—Special usage—Pleading and proof—Nambudri illom—Mortgage by step-mother of family property—Necessity—Existence of, if validates mortgage.

Nambudris of Malabar are governed by the Hindu Law as laid down by the Mitakshara except so far as it is shown to have been modified by usage or custom having the force of law. In dealing with Nambudris, Courts will apply the ordinary Hindu Law unless either party shows that a special usage or custom unknown to the ordinary Hindu Law has been established by precedent or adduces evidence in the trial in proof of such usage. When such special usage is not pleaded or proved in the trial Court, the High Court would not, on second appeal, allow the parties an opportunity to amend their pleadings and adduce evidence in support of the usage.

A Nambudri *illom* consisted of a father who was an idiot, his two sons who were minors, and their step-mother who was managing the household and looking after the minors. The step-mother borrowed money on a mortgage of the family properties for family necessity. In a suit to enforce the mortgage, *held,* that the mortgagor had no authority either as guardian of the members of the family or as its surviving efficient member, to mortgage the family estate and that the mortgage was not enforceable against the family properties.

Appeals against the decrees of the Court of the Subordinate Judge of Ottapalam in A. S. Nos. 25 and 26 of 1920, preferred against the decree of the Court of the District Munsif of Ottapalam in O. S. No. 326 of 1917.

T. R. Ramachandra Aiyar, T. R. Krishnaswami Aiyar and *N. A. Krishna Aiyar* for appellants.

K. P. M. Menon for respondents.

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*S A Nos. 7 and 302 of 1922. 1st August, 1924.

Narayanan Nambudri *v.* Ravunni Nair.

The Court delivered the following

JUDGMENT :—Appeal from the decree in A. S. No. 25 of 1920 on the file of the Court of the Subordinate Judge, Ottapalam (O. S. No. 326 of 1917 on the file of the Court of the District Munsif of Ottapalam).

Plaintiffs sue to recover Rs. 2,917-3-2 due under two hypothecation deeds executed to them in 1905 by one Pappi Antarjanam. The lower appellate Court decreed the suit for Rs. 1,235-6-9 and defendants 2 and 3 appeal. Defendants 2 and 3 were the minor sons of a Nambudri, defendant 1, since deceased. He was an idiot and deaf. Pappi Antarjanam is his second wife and step-mother of defendants 2 and 3. The plaint sets forth that at the time when she executed these mortgages Pappi Antarjanam was the "manager" (*sic*) of the defendants' *mana* on her own behalf and as guardian of the three defendants. The defendants in their written statement besides alleging fraud contended that Pappi Antarjanam had no authority to execute any document whatever. The minors were not under her guardianship.

The only issue framed is whether the suit bonds are valid and supported by consideration. The District Munsif has assumed throughout his judgment that Pappi Antarjanam had authority to borrow and confines himself to the question of justifiable necessity. The omission to discuss whether she was capable of borrowing is made the second ground of appeal in the lower appellate Court. The learned Subordinate Judge found that she was in a very necessitous condition and "had to incur debts for maintenance and household expenses for a period of eight months and in any view of the law applicable to the case, whether the ordinary Hindu Law obtaining on the East Coast, or the special Nambudri Law applicable to the case of a Nambudri female in management (as to which the law is not quite settled—see Ramachandra Aiyar's *Malabar Law*, S. 88 and *Topics of Malabar Law*, 12 M. L. J. 180) such debts would be binding on the defendants." The correctness of these observations is the point for determination in this appeal. There can be no doubt that by the law of the Mitakshara the wife of an idiot has no right to mortgage the estate of his sons in order to provide for the family maintenance. Nor is it altogether correct to say that the special Nambudri Law is not quite settled. The whole question of Nambudri Law is very fully discussed in *Vishnu*

Nambudri v. *Akkamma* (1) and *Vasudevan* v. *The Secretary of State for India* (2). Nambudris are governed by Hindu Law which, generally speaking, is the law laid down by the author of the Mitakshara, except so far as it is shown to have been modified by usage or custom having the force of law. Thus, in dealing with Nambudris, the Courts will apply the ordinary Hindu Law unless either party can show that a special usage or custom unknown to the ordinary Hindu Law has been established by precedent or unless such party can prove such custom in the trial itself. It was therefore open to the plaintiffs in the present case either to cite authority or to adduce evidence establishing their proposition that Pappi Antarjanam had authority to mortgage the estate by virtue of special Nambudri custom. I do not find that when the case originated this point was even present to their minds. They relied upon the fact that while actually managing the household and looking after the minors, she had no other recourse but to borrow. Therefore no evidence has been led to show (as now argued) that the last efficient member of a Nambudri family, irrespective of sex, assumes the right of management with all the incidents appertaining to that right in Hindu Law. Plaintiffs have not attempted to prove such special custom in the trial itself, and can only succeed at this stage if they can cite precedents which establish their contention. In *Vasudevan* v. *The Secretary of State for India* (2), when the contention that the sole surviving female has all the powers of the surviving male was under discussion, Mr. F. Wilkinson, an experienced Judge in South Malabar, had held that a Nambudri widow who is the sole surviving member of her *illom* is in the same position as any other Hindu widow (p. 166) and this opinion was affirmed by a Bench of this Court (p. 171).

Nor is there any ruling to the contrary effect (*cf.* Sundara Aiyar's *Malabar Law*, S. 131, page 219, Edn. 1922). Thus plaintiffs cannot rely upon precedent. It is urged on behalf of plaintiffs that they should be allowed an opportunity at this stage to call witnesses in order to prove the custom which they set up. This would involve an amendment of the plaint (unless much more is read into the English word " Manager " than the parties ever intended. That they did not intend the

1. (1910) I L R 34 M 496 : 20 M L J 938.
2. (1888) I L R 11 M 157.

Narayanan Nambudri v. Ravunni Nair.

connotation now pressed is shown by the issues and conduct of the trial). I hold that parties *prima facie* governed by Hindu Law must make it quite clear in their pleadings and when issues are framed and witnesses are summoned that they intend to prove special custom ; otherwise the trial will be conducted throughout on the assumption that the ordinary Hindu Law applies. I see no reason to allow the plaintiffs to prove this matter of fact at this stage. It is not contended on their behalf that the *de facto* guardianship of Pappi Antarjanam gave her any right to mortgage the estate. A *de facto* guardian is scarcely distinguishable from an intermeddler ; he may act from the best of motives and in the best interests of the minors and their estate, but he is equipped with no special authority and the validity of his acts depends upon their condonation. Most of the discussion in the Courts below is only relevant as showing that Pappi Antarjanam had moral justification for her acts it does not show that she had legal authority. I hold therefore that either as guardian or as surviving efficient member she had no power to execute the suit mortgages and the suit must be dismissed with costs throughout. The appeal is allowed.

Judgment in S. A. No. 302 *of* 1922 :—For the reasons given in S. A. No. 7 of 1922, this appeal is dismissed with costs. Only one Vakil's fee in this and in S. A. No. 7 of 1922.

A. V V. *S. A. No.* 7 *allowed.*

S. A. No. 302 *dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Kutti Goundan and another *Petitioners** (*Accused* 1 *and* 2)

Kutti Goundan, *In re*

Criminal Procedure Code, S. 110—*Proceedings under S.* 112—*Notice under—Validity—Conditions—Defects in notice—If cured by explanation given by Prosecuting Inspector at commencement of trial—Object of notice under S.* 112—*Joint trial in proceedings under S.* 110—*When bad.*

The issue of a preliminary notice under S. 112, Criminal Procedure Code, is not a formal matter ; it is a judicial act to be exercised after due consideration of the materials placed before him by the Magistrate.

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* Cr R C. No. 836 of 1923 3rd September 1924.
(Cr R. P. No. 668 of 1923).

Kut. Gounda, *In re.*

Held, that the notice served upon the petitioners under S. 112, Criminal Procedure Code, did not comply with the provisions of the Code as it was very meagre and did not contain sufficient details regarding the charges brought against them.

Held further that, the object of the notice under S. 112, Criminal Procedure Code, being to enable the accused to prepare for his defence and to summon witnesses on his side before the actual trial commences, the defects in the notice could not in any way be remedied by explanations given by the Prosecuting Inspector at the commencement of the trial.

In a case in which proceedings were taken against the two petitioners not only for their conduct coming within clauses (*d*) and (*e*) of S. 110, Criminal Procedure Code, but also under clause (*f*) thereof for the reason that they were so desperate and dangerous as to render their being at large without security hazardous to the community, both the petitioners were tried jointly, and evidence relating exclusively to the nefarious acts of each of the petitioners was let in in addition to the evidence regarding the events in which it was alleged that they were associated together, and the Magistrate passed an order against them on a consideration of the entire evidence thus introduced into the record against both the petitioners.

Held, that the petitioners should not have been jointly tried, and had been prejudiced by such joint trial.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the District Magistrate of Coimbatore in Criminal Appeal No. 10 of 1923 preferred against the order of the Court of the Sub-divisional 1st Class Magistrate of Coimbatore Division in M. C. No. 1 of 1923.

Dr. S. Swaminadhan for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—This is an application to revise an order passed against the petitioners under S. 110, cls. (*d*), (*e*) and (*f*) of the Criminal Procedure Code, binding them over to be of good behaviour for three years by executing a bond each in the sum of Rs. 3,000 with two sureties each for Rs. 1,500 as being habitual extortioners and oppressors of their fellow-villagers. Proceedings were first taken against them under S. 107, Criminal Procedure Code, but these were dropped on the 5th of January, 1923, and apparently on the same day the proceedings which form the subject-matter of this revision were started against them on a fresh petition. A preliminary notice under S. 112, Criminal Procedure Code, was sent to

them on or about the 10th of January, 1923. A joint enquiry against both the petitioners was then held and the order complained against was passed by the Sub-divisional First Class Magistrate of Coimbatore and this has been confirmed by the District Magistrate.

Dr. Swaminadhan, who argued the case at great length, has attacked this order on two grounds, namely, (1) that the proceedings are vitiated on the ground that the notice served upon the petitioners under S. 112 does not comply with the provisions of the Criminal Procedure Code inasmuch as it is very meagre and does not contain sufficient details regarding the charges brought against them and, in consequence, the petitioners have been handicapped in their defence, and (2) that the trial of the petitioners jointly has also in the circumstances of this case considerably prejudiced them.

I now proceed to consider these grounds separately. The notice served upon the petitioners runs thus :—"Whereas it has been made to appear to me that you, within the last 18 months, at Malamachampatti and its neighbourhood, have been oppressing people with your illegal exactions, and have been a menace to the security and safety of the villagers owing to your unlawful acts and have been consequently committing and abetting the commission of offences involving a breach of the peace and are so desperate and dangerous as to render your being at large without security hazardous to the community You are hereby required to show cause why you should not be ordered to furnish security." When the case came on for hearing, the petitioners took the objection "that the notice served upon them in the above case is not in accordance with S. 112, Criminal Procedure Code, in that it does not give the substance of the information against them and that the accused are, therefore, not in a position to meet the charge against them in the way they are entitled to." On this being brought to the notice of the Court it appears from the records that the Prosecuting Inspector of Police explained the case for the prosecution and the Magistrate made a note that "Every facility will be given to enable the counter-petitioners' Vakil to know the detailed information deposed to by each witness before they are cross-examined." It is obvious that the note of the Magistrate just mentioned has nothing to do with the objection raised by the petitioners as the latter refers to defects in the notice and the note refers to facilities to be

Kutti Goundan, *In re.*

given to the petitioners for knowing the evidence of each witness. The learned District Magistrate himself has stated in paragraph 5 of his judgment, " It is true that the preliminary order under S. 112 is very brief and does not contain details of the case proposed to be proved " ; but this defect did not seem to him to be of any importance in view of the fact that at the beginning of the trial the case was explained to the petitioners by the Prosecuting Inspector of Police who appeared for the prosecution. In this Court the learned Public Prosecutor has not stated that the notice gives full information, but his contention has been that the substance of the information which they were entitled to under S. 112, Criminal Procedure Code, was given in the notice and the defect, if any, was cured by the explanation given by the Prosecuting Inspector at the commencement of the trial. The records make it clear that, at the time when the notice was sent, the Police had more or less complete information against the petitioners at their disposal and the vague description given in the notice cannot in any sense be said to be a substance of the available information. As pointed out in *In re, Kripa-Sindhu Naiko and Harikrishna Naiko* (1), "notices under S. 110, Criminal Procedure Code, must contain something more than a re-production of the clauses of the section. There should be sufficient indication of the time and place of the acts charged and sufficient details which would enable the accused to know what facts he is to meet though it is not necessary to give a list of the witnesses. " The notice given to the petitioners in the case reported in *In re, Kripasindhu Naiko and Harikrishna Naiko* (1) is very similar to the notice in the present case. In *Nagi Konda Reddi* v. *King-Emperor* (2) it was held by Abdur Rahim and Napier, JJ. that a notice which did not at all state when the threats complained of were uttered, who are the persons who were threatened and when the apprehension of a breach of the peace arose was vague and bad in law. In *Ranga Reddi* v. *King-Emperor* (3) after stating that it is of the utmost importance in cases of this description that the first information should be clear and specific, the learned Judges observe :—" The accused is to be put on his trial on information received behind his back. In the case of a complaint, the accused may be entitled to a copy,

1. (1918) 8 L W 461 at 467. 2. (1917) I L R 41 M 246.
3. (1919) I L R 43 M 450 : 38 M L J 97.

Kutti Goundan, *In re.*

if he applies for it, but in the case of an information of this kind, which *ex necessite* is a confidential one, the accused is entitled to be told the nature and extent of the information on which the Magistrate intends to base the action against him. It is that communication that is expected to enable the accused to summon witnesses on his side. Therefore, if the substance of the report made to the Magistrate is not clearly disclosed, and the accused is not informed of the charges, of the nature of the evidence that he is to rebut, the proceedings cannot be regarded as legal." Having regard to this observation, it must be held that the notices to the petitioners issued in this case do not contain the necessary information required under S. 112, Criminal Procedure Code. The question is whether the explanation of the case at the beginning of the trial by the Prosecuting Inspector of Police is sufficient to make up for the disadvantages under which the petitioners laboured owing to the vagueness of the notice. In view of the fact that the object of the notice is to enable the accused to prepare for his defence and to summon witnesses on his side before the actual trial commences, I do not think an explanation of the prosecution case by the Prosecuting Inspector at the commencement of the trial will be sufficient to make up for the extreme vagueness of the notice and will be a compliance with the strict provisions of law contained in S. 112, Criminal Procedure Code. The issue of a notice is not a formal matter ; it is a judicial act to be exercised after due consideration of the materials placed before him by the Magistrate [see *In re, Kripasindhu Naiko and Harikrishna Naiko* (1)]; and, therefore, the defects in the notice cannot in any way be remedied by explanations given by the Prosecuting Inspector at the time of the trial. I, therefore, hold that the notice issued to the petitioners in this case was bad in law.

The second argument urged on behalf of the petitioners is that they have been considerably prejudiced by their joint trial. Evidence relating exclusively to the nefarious acts of each of the petitioners has been let in in this case in addition to the evidence regarding the events in which it is alleged that they were associated together, and the Magistrate has come to his final conclusion on a consideration of the entire

1. (1918) 8 L W 461 at 464.

Kutti Goundan, *In re.*

evidence thus introduced into the record against both the petitioners. The dangers resulting from such a procedure have been very well pointed out in the following observations made by Walsh, J. in *Emperor* v. *Angnu Singh* (4) :—"I have myself upset orders under this section where the evidence against one person charged has been used in the judgment as evidence against another not mentioned by the particular witness. There is always a danger of that, and a danger of its unconsciously operating on the mind of the tribunal even though such operation does not manifest itself in the judgment ; and if there were no other features in the case, I should have been disposed to set aside the proceedings on that ground alone.. Without laying down any rule or consulting any section, common sense and common justice dictates that proceedings against a man for badmashi should be confined to himself alone, unless the case is that he has a confederate or a partner to whom all the evidence is equally applicable." In the light of these observations with which I agree I think it must be held that the procedure adopted by the Magistrate in this case has considerably prejudiced the petitioners in their defence. It has also to be observed that in this case the proceedings were taken against the petitioners not only for their conduct coming within cls. (*d*) and (*e*) but also under cl. (*f*) for the reason that they are so desperate and dangerous as to render their being at large without security hazardous to the community. In *Hari Telang* v. *Queen-Empress* (5) the petitioners were called upon to execute bonds for their good behaviour on the ground (1) that they habitually commit extortion, (2) that they habitually commit or attempt to commit or abet the commission of offences involving a breach of the peace, and (3) that they are dangerous persons so as to render their being at large without security hazardous to the community and were tried jointly by the Magistrate under S. 117, Criminal Procedure Code, and each of them was ordered to execute a bond with sureties to be of good behaviour for three years. As regards the objection that they should not have been tried jointly under S. 117, cl. (4), Criminal Procedure Code, the learned Judges held that, even supposing that the Magistrate was right in considering that there was habitual association between the

4. (1922) I L R 45 A 109. 5. (1900) I L R 27 C 781.

Kutti Goundan, *In re.*

three persons in regard to the first and second grounds, there certainly would be no such connection between them in regard to their characters so as to make them dangerous persons, and thus render their being at large without security hazardous to the community, and that proceedings should have been separately taken against each of them. The evidence in this case as regards the association of the accused does not seem to be strong. I, therefore, think that the petitioners in this case should not have been jointly tried.

Under these circumstances, I would set aside the order that has been passed against the petitioners and direct that they should be tried separately after serving a proper notice to them in strict compliance with S. 112, Criminal Procedure Code.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Appatta Chathu Nambiar and others. .*Appellants** (*Plffs.*)

v.

Appatta Sekharan Nambiar and others *Respondents* (*Defendants* 1, 3 *to* 12, 13 *to* 22, 24 *to* 27, 29 *to* 47, 48 *to* 57 *and* 60, 61).

Chathu Nambiar *v.* Sekharan Nambiar.

Malabar Law—Tarwad and tavazhi—Acquisitions by Karnavan—Presumption—Allotment of tarwad property for maintenance by Karnavan—Right of junior members to set aside—Denial of rights of tarwad in tavazhi karar—If works out forfeiture.

In the absence of evidence to the contrary, there is a presumption that property acquired by the *Karnavan* of a *tavazhi* was acquired for the *tavazhi* and with the *tavazhi* funds, and this presumption must prevail unless the person who avers that such property is his self-acquisition proves that fact by evidence.

Junior members of a *tarwad* cannot set aside an arrangement that has been made by the *Karnavan* for the enjoyment of the *tarwad* properties by the members thereof. It is only the *Karnavan* that can ask for return of possession from them.

The members of a *tavazhi* who were in possession of certain *tarwad* properties under a maintenance arrangement made by the *Karnavan* made a statement in a *Karar* that those properties were the *jenm* property of the *tavazhi*. A

*S. A. No. 873 of 1921 10th March, 1924.

Chathu Nambiar v. Sekharan Nambiar.

suit was filed by some of the junior members of the *tarwad* for recovering possession of the same, whereupon the defendants admitted the title of the *tarwad* but claimed the value of improvements for the *tavazhi*. *Held*, the denial of title in the *Karar* is no ground for taking away possession from the defendants, as the case is different from a tenant's forfeiture of rights by denying the title of his landlord.

Second Appeal against the decree of the District Court of North Malabar in A. S. No. 11 of 1917 preferred against the decree of the Court of the District Munsif of Quilandy in O. S. No. 17 of 1915.

C. V. Anantakrishna Aiyar for appellants.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—This suit is brought to recover with mesne profits possession of the properties described in the plaint from the possession of the defendants on the allegation that they are *tarwad* properties. The plaintiffs and the defendants are all members of a Marumakkatayam *tarwad* called "Appatta." The 1st defendant is the present Karnavan of that tarwad and the other defendants also belong to the tarwad. The plaintiffs who are some of the members of the tarwad are the appellants before me. The defendants against whom reliefs are claimed in this suit are also members of a tavazhi in the tarwad called Kuttierikandi tavazhi. The lower Courts have found that though the existence of the tavazhi was denied such a tavazhi does exist as a separate body in the tarwad with a separate Karnavan and owning separate properties. The members of the tavazhi claim the suit properties as theirs except items 1 to 12 and 14 which are admitted to be tarwad properties. The second appeal has been argued before me only with reference to items 27, 28, 29, 34, 35, 37 and 38 and items 1 to 6 and the improvements on items 8, 9 and 10. As regards items 27 and 28 the evidence is that they were originally acquired on an *otti* right in the name of one Ukkandan Nambiar by the then Karnavan of the tavazhi, Imbichunni Nambiar, and that in 1889 the jenm right was acquired by Imbichunni Nambiar himself, part of the consideration of the jenm right being the *otti* amount which had previously been advanced. Imbichunni Nambiar being the Karnavan of the tavazhi at the time there is a presumption in favour of holding that he acquired the properties for the tavazhi. The lower Court has also found that

Chathu Nambiar v. Sekharan Nambiar.

the claim of the tarwad even if it had any at any time, is clearly barred by limitation as from 1889 onward the defendants tavazhi has been in possession.

As regards item 29 that was acquired by Ukkandan Nambiar in 1071 (1896) under Ex. FF. At that time he had become the Karnavan and manager of Kuttierikandi tavazhi. So the learned Judge was right in holding that in the absence of evidence to the contrary, the presumption was in favour of the view that the property acquired by him was acquired for the tavazhi and with the tavazhi funds. And this presumption must prevail unless the person who avers that the property is self-acquisition proves that fact by evidence.

Items 34 and 35 were purchased in Court auction in 1889 by Kelappan Nambiar, the previous Karnavan of this tavazhi, and the tavazhi has been dealing with these items as pointed out by the learned Judge ever since as their property.

Items 37 and 38 were also acquired by the same person Kelappan Nambiar. Kelappan Nambiar himself was a party to the *Karar*, Ex. QQ, and admitted that these properties belonged to the tavazhi and were acquired with the help of the other tavazhi members and with tavazhi funds. Therefore it is clear that these properties belong to the tavazhi.

A point of law was raised before me that the self-acquisitions of a junior member of a tarwad lapsed to the tarwad on his death and not to the tavazhi even though he is a member of the tavazhi also. That was so laid down in *Govindan Nair* v. *Sankaran Nair* (1).

That case has no application here. It is only of importance to show the lower Court's statement in paragraph 4 that the self-acquisition of the junior members of the tavazhi lapsed to the tavazhi and not to the tarwad is not correct.

As regards items 1 to 6 they are admittedly tarwad properties and they are in possession of some of the members of the Kurrierikandi tavazhi but the members of the Kuttierikandi tavazhi are also members of the tarwad and they are entitled to be in possession of the properties of the tarwad until and unless the Karnavan of the tarwad asks for the return of their possession from them. But in this case the Karnavan is not suing and as the plaintiffs are junior members and belong

1. (1908) I L R 32 M 351.: 19 M L J 350.

Chathu Nambiar v. Sekharan Nambiar.

to another tavazhi it is not open to them to set aside any arrangement that the Karnavan has made for the purpose of the enjoyment of the tarwad properties by the junior members. In the case of items 1 to 6 even the plea that the junior members were setting up adverse possession of the jenm title against the tarwad has not been established and therefore there is no ground for recovering the properties from these junior members of the tarwad, it is therefore clear that the suit for recovering items 1 to 6 cannot stand.

It is finally urged that item 32 has been lost sight of by the lower appellate Court in its judgment though it was admitted to be tarwad property. But on looking at the statement in paragraph 37 of the Munsif's judgment, it is clear that the plaintiffs' claim for items 30 to 33 were given up before him. That must be the reason why nothing has been said by the appellate Court as regards item 32.

The last contention is as regards the improvements on items 9, 10 and 11. It is urged that these improvements were made by one Kanaran Nambiar, a junior member of the tarwad, and that therefore on his death these improvements should be taken to have lapsed to the tarwad under the ruling in *Govindan Nair v. Sankaran Nair* (1). But unfortunately for this argument the man who made the improvements had made a gift of his property before his death under Ex. XLIV to his brothers and other members of his tavazhi. That claim also fails. There does not seem to be any valid ground for the second appeal which fails and must be dismissed with costs.

MEMORANDUM OF OBJECTIONS.

The Memorandum of Objections refers to items 7, 9, 10 and 11. The Munsif dismissed the suit as regards them also but the Subordinate Judge has given a decree to the plaintiffs for possession of those properties on payment of the value of improvements ; and the value of improvements has been assessed by him. These properties are admittedly tarwad properties just as items 1 to 6 are which have been already dealt with in the appeal. The only difference between items 1 to 6 and these items is that in a *Karar* entered into by the members of the Kuttierikandi tavazhi a statement was made that they were the jenm properties of the tavazhi, whereas with regard to items 1 to 6 there was no such statement. The Subordinate

1. (1908) I L R 32 M 351 : 19 M L J 350.

Judge has held that because the jenm title of the tarwad was denied by the members of the tavazhi the properties should be taken away from them and he has decreed possession in favour of the plaintiffs. It must be borne in mind in this connection also that the Karnavan of the tarwad does not seek to recover possession of these properties. The question then is whether the fact that in the *Karar* the members of the Kuttierikandi tavazhi made a statement denying the jenm title of the tarwad is a sufficient ground for differentiating between items 7 and 9 to 11 and the other items of the tarwad property. I am inclined to think that it is not. In the written statement filed by the defendants they unconditionally admitted that these properties also belonged to the tarwad and have withdrawn from the position they took up in the *Karar*. They have only claimed in the case the value of the improvements on these items which they said belonged to the tavazhi. Now that being so there is no reason for thinking that their being continued in possession of these properties would in any way work to the prejudice of the tarwad. It might be that because the jenm title of the tarwad was denied in the *Karar* the plaintiffs were right in bringing the matter into Court but when once the defendants admitted the jenm title of the tarwad there is no further reason to take away the possession of the properties from the defendants. They as members of the tarwad are quite as entitled to be in possession of these properties with the permission of the Karnavan of the tarwad as the plaintiffs themselves are who are only other junior members of the tarwad. It would be open always to the Karnavan to get possession of these tarwad properties from the plaintiffs if he wants them. But I do not think the plaintiffs should be allowed to insist upon a decree being given for the delivery of these properties to them on behalf of the tarwad. I am inclined to think that the reasons given by the Munsif are correct and that the Subordinate Judge should not have interfered with his decree. The Subordinate Judge has treated the defendants as if they were tenants under the Karnavan of the tarwad of these properties and has held that the denial of the title of the tarwad in the *Karar* has worked a forfeiture of any right they have in the property. This view is clearly incorrect as it was not the case of the plaintiffs or any one else that the defendants were in possession of these properties as tenants. In fact, on the evidence referred to by the District Munsif it is clear that

Chathu Nambiar v. Sekharan Nambiar.

the plaintiffs were not able to say in what capacity the defendants were in possession. The defendants themselves have had possession of these properties with the permission of their Karnavan for their own maintenance after paying the Government revenue and other incidental expenses, and it is clear also that they have considerably improved the properties. Under these circumstances it seems to me that the memorandum of objections must be allowed and the decree giving possession of the properties to plaintiffs should be set aside. As regards costs of the Memorandum as the defendants did once deny the tarwad title I do not think that any costs should be given to them. I direct each party to bear their own costs so far as these items are concerned not only in the Memorandum of Objections but in both the Courts below.

T. S. V. *Memo. of Objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Sithamraju Ananda Rao and others ... *Appellants** (*Defendants Nos.* 1 to 6)

v.

Sri Raja Venkatadri Appa Rao Bahadur Zamindar Garu ... *Respondent* (*Plaintiff*)

Ananda Rao v. Appa Rao.

Res judicata—*Minor—Decision in suit by or against*—Res judicata *against minor—Conditions—gross negligence of guardian* ad litem—*What constitutes—Omission to rely upon a judgment in support of plea of* res judicata *if gross negligence—Second appeal—Gross negligence of guardian* ad litem—*Finding as to—Interference with—Jurisdiction.*

The question was whether the plaintiff's claim was barred by *res judicata* by reason of the decision of the High Court in a prior second appeal. Both the Courts below held that the decision in the second appeal was not binding on the plaintiff inasmuch as he was a minor at the time, and his guardian, the Court of Wards, was guilty of negligence.

No evidence was adduced to show that the manager under the Court of Wards or any of the other persons responsible for the conduct of the previous litigation was either negligent or that he did not conduct it with due care and diligence. The Courts below came to the conclusion that there was negligence merely on the fact that a previous judgment between the parties had not been relied upon in the previous litigation for the purpose of raising the plea of *res judicata.*

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*S. A. No. 978 of 1923. 23rd July, 1924.

Ananda Rao v. Appa Rao.

Held, that the Courts below erred in holding that there was gross negligence or such negligence as would be sufficient to vitiate the decision in the second appeal and that the same therefore operated as *res judicata* against the plaintiff.

Held further that what was gross negligence was a question of mixed law and fact and that it was competent to the High Court in second appeal to interfere with the finding of the Courts below on such a question.

Second Appeal against the decree of the District Court of Kistna at Masulipatam in A. S. No. 138 of 1921 presented against the decree of the Court of the Additional Deputy Collector of Bezwada in O. S. No. 126 of 1920.

V. Ramadoss for appellants.

G. Lakshmanna and *V Govindarajulu Naidu* for respondent.

The Court delivered the following

JUDGMENT :—The only point argued in this Second Appeal is whether the plaintiff's claim is barred by *res judicata* by reason of the decision in S. A. No. 1240 of 1911, Ex. V. Both the lower Courts have held that this decision is not binding on the plaintiff inasmuch as he was a minor at the time and his guardian, the Court of Wards, was guilty of negligence. Mr. Lakshmanna who appears for the respondent contends that it is not open to this Court to go behind their finding. But I am unable to accept that contention because the question whether there was negligence or such negligence as would vitiate the proceeding in a Court of Law is not only a question of fact but a question of mixed law and fact. What is gross negligence is not merely a question of fact but one of mixed law and fact and therefore it is quite competent to the High Court in Second Appeal to go into the question to see whether there was gross negligence on the part of the minor's guardian in the conduct of the previous suit. The question involved is as regards the rate of rent for a Baput wet land. The High Court decided in 1911 in S. A. No. 1240 of 1911, *vide* Ex. V, that the rent payable was not at the rate claimed but at a lower rate, *viz.*, Rs. 2-11-4. In the course of the judgment the learned Judges observe that the question of *res judicata* was raised but there was no clue as to the identity of the lands and the question of *res judicata* was not put in issue in the lower Courts. There was another decision of the High Court which is evidenced by Ex. B-2 in which it was held that the plaintiff was entitled to a higher rate at the rate of Rs. 5.

Ananda Rao v. Appa Rao.

The question is whether the Court of Wards was grossly negligent in not acting upon Ex. B-2 when the suit of 1907 which ultimately came up in S. A. No. 1240 of 1911 was filed. In the present case no evidence has been adduced to show that the manager under the Court of Wards was either negligent or that he did not conduct the case of 1907 with due care and diligence. All that is brought forward is that Ex. B-2 was not relied on for the purpose of raising the plea of *res judicata*. We do not know under what circumstances the manager and those who helped him in the conduct of the suit did not rely upon Ex. B-2 and did not raise the question of *res judicata*. The question was sought to be raised before the High Court, but the High Court found that the identity of the parties was not established and therefore the previous judgment could not be *res judicata* between the parties, and they also say :—" The first Court states that the judgments relating to the previous suit give no clue to the identity of the lands. " And they go on to say :—" The Judge does not hold that the lands are the same and we have not been referred to any evidence to show that the lands are identical." And they modified the decree of the District Court by giving the plaintiff rent at the lower rate. Mr. Lakshmanna for the respondent contends that the facts appearing in evidence are sufficient to make out such negligence as would be sufficient to vitiate the proceeding in a Court of Law, and he relies upon *Ponnayyah* v. *Viranna* (1) in support of his contention. In that judgment there is an observation upon which he very strongly relies :— " It must be such negligence as leads to the loss of a right which might have been successfully asserted if the suit had been defended with due care. " This sentence taken from its context no doubt would lend colour to the contention of the learned Vakil. But we have to see under what circumstances that observation came to be made. Where a guardian omits to put forward a plea which he should have put forward or fails to defend the suit which he ought to have defended, no doubt he would be guilty of negligence. But where a suit is prosecuted with due diligence the mere fact that a certain document which might have helped the party was not filed in evidence is not by itself sufficient to show that there was gross negligence on the part of those who conducted the litigation on behalf of the minor. It is not every kind

(1) (1921) I L R 45 M 425 42 M L J 429.

Ananda Rao v. Appa Rao.

of negligence that would be a ground for relief in subsequent proceedings. It must be such negligence as would be called gross negligence in law, that is, such negligence as would imply that the person guilty of it neglected to do what was plainly his duty to do or did something which he ought not to have done or omitted to do something which any man of ordinary prudence would have done. There is no evidence in this case that any of the persons responsible for the conduct of the previous litigation were guilty of such negligence. Mr. Lakshmanna relied also upon *Gotepati Subban* v. *Gotepati Narasamma* (2). In that case Sankaran Nair, J. who was one of the Judges found that the guardian put forward a false case suppressing the true case knowing that by doing so he was endangering the right of the minor. He put forward a false claim under a false case of adoption knowing perfectly well that under a will the minor was entitled to have half the property. It was held in that case that the guardian was guilty of gross negligence and that the proceedings in the suit could not bind the minor. The observation in *Parmeswari Pershad Narayan Singh* v. *Sheo Dutt Rai* and *Jhumak Singh* v. *Sheo Dutt Rai* (3) is very general. In every case the Court has to see whether the facts are sufficient to make out gross negligence on the part of the guardian. In this case there is no such evidence forthcoming, and therefore it cannot be said that the Court of Wards or their agent or the manager who was in charge of the estate of the minor plaintiff was guilty of gross negligence. Both the lower Courts have come to the conclusion that there was negligence merely on the fact that the previous judgment, Ex. B-2, was not relied upon in the suit of 1907. Both the Courts have gone wrong, and I have no hesitation in holding that there was not gross negligence or such negligence as would be sufficient to vitiate the proceedings in a Court of Law. That being so, Ex. V is binding on the plaintiff as well as on the defendants.

Mr. Lakshmanna further contends that the plaintiff is entitled to ask for a share of the produce. But this contention was negatived in the previous suit; for the learned Judges say :—" If the plaintiff was entitled to revert to the *varam* rate or claimed to revert to it and the higher rate was agreed to be paid in settlement of that claim, the contract would be supported by consideration. That was the case in some

2. (1914) 27 M L J 486. 3. (1907) 6 C L J 448.

Ananda Rao v. Appa Rao.

of the decisions referred to by the Judge. But those are not the facts here. And following these decisions we hold that that the patta must be modified by disallowing the rate of Rs. 5 and inserting the lower rate." The questions now raised were actually raised and decided in the previous suit, and therefore the plaintiff is not entitled to re-open them.

In the result the appeal is allowed so far as the 6th appellant is concerned who is the only person who is now supporting the appeal and the decrees of the lower Courts would be modified by inserting Rs. 2-11-4 instead of Rs. 5. 6th appellant is entitled to proportionate costs throughout.

Appellants 1 to 5 have settled the disputes with the respondent, and filed a compromise petition. A decree will be drawn up in terms of the compromise petition so far as they are concerned.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Kandaswami Chetti *Appellant* (Plaintiff)*

v.

Adimoola Chetti (dead) and another *Respondents (Defendants).*

Kandaswami Chetti v. Adimoola Chetti.

Mortgage—Moveables—Sale of hypotheca by owner——Purchase of similar articles—Mortgagee's lien if attaches to new article.

The owner of two bulls hypothecated them to another, retaining possession with himself. He subsequently sold the bulls and with the sale proceeds purchased two new bulls a few days after. When a creditor tried to attach these bulls, the mortgagee claimed that his hypothecation right extended to the substituted bulls. *Held,* the right of a hypothecatee of chattels does not attach itself to goods or chattels purchased with the sale proceeds of chattels or goods mortgaged, unless there is a contract that he should have a right against the substituted articles. *Chidambara* v. *Muthaya,* I L R 5 Mad 330 followed ; *Taylor* v. *Plumer,* 105 E. R. 721 ; *Sinclair* v. *Brougham,* (1914) A. C. 398 referred to ; the rights of a mortgagee of immoveable property distinguished.

Second Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 52 of 1921 (A. S. No. 154 of 1920 on the file of the District Court, South Arcot) preferred against the decree of the Court of the District Munsif of Cuddalore in O. S. No. 190 of 1919.

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*S A No. 122 of 1922. 29th August, 1924.

K. Rajah Aiyar and *P. K. Janakirama Aiyar* for appellant.

M. S. Venkatrama Aiyar for respondents.

The Court delivered the following

Kandaswami Chetti v. Adimoola Chetti.

JUDGMENT :—The plaintiff in this case attached before judgment two bulls belonging to his judgment-debtor, Veera Pillai. The defendants put in a claim petition that they had a hypothecation right over the bulls and their claim petition was allowed in their favour. The plaintiff has brought the suit for a declaration that he is entitled to execute the decree obtained by him against Veera Pillai and that the bulls are not subject to any charge in favour of the defendants. Both the lower Courts have held that the hypothecation of the bulls in favour of the defendants prevailed over the right of the plaintiff to attach the bulls and dismissed his suit. The judgment-debtor had two bulls which he hypothecated to the defendants. He sold these bulls in a shandy for Rs. 115 and purchased, four or five days after, the bulls in question for Rs. 125. Mr. Rajah Iyer on behalf of the appellant contends that the hypothecation right of the defendants does not attach to the bulls purchased by the judgment-debtor with the sale proceeds of the bulls hypothecated. That the hypothecation of chattels is valid is now well settled by *Narasiah* v. *Venkataramiah* (1). In the case of a mortgage of immoveable property the mortgage right attaches to the property which is substituted for the mortgaged property. In *Venkatarama Iyer* v. *Esumsa Rowthen* (2) it was held that the mortgagee was entitled to a charge on the property which through no fault of his had taken the place of the mortgaged property. Krishnaswami Iyer, J., who delivered the leading judgment in the case, relied upon the principle contained in S. 73 of the Transfer of Property Act and held that the mortgagee is entitled to a charge on the property which has taken the place, in substitution, of the property actually mortgaged. At page 434 he observed " It is well known that the money or the property given by Government in substitution for the lands taken up under the Land Acquisition Act is charged in favour of the mortgagee who had his claim upon the property so taken." When properties are acquired under Land Acquisition Act by the Government and some other property is given in substitution the charge in favour of the mortgagee attaches to the property so substituted. But

1. (1918) I L R 42 M 59 : 35 M L J 450.
2. (1909) I L R 33 M 429 : 20 M L J 330.

Kandaswami Chetti v. Adimoola Chetti.

in order that the charge may attach to the newly acquired property it must be clear from the evidence that the newly acquired property was the property sought to be substituted for the property actually mortgaged. Otherwise the mortgage charge on the mortgaged land would not attach to the property newly acquired. In *Nidhi Lal* v. *Mazhar Hussain* (3) the facts were : *N* was in possession of six shops in a market-place, two as mortgagee and the other four as proprietor. The Municipal Committee of that place decided to establish the market in a fresh place, and to use the site of the old market for other purposes, and arranged with *N* to take the sites of his six shops in the old market-place and gave him in lieu of them sites for six shops in the new. Under this arrangement he built six shops in the new market-place. Subsequently, the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage money and cost of constructing the shop. The Court held that the claim could not be allowed, inasmuch as it could be justified only by a proof of an agreement binding upon the parties at the time when the transaction occurred, that some specific one among the new shops should be substituted for the old one which was the subject of the mortgage, and it had not been found that any such agreement was made. As observed by the learned Chief Justice, " The plaintiff's claim was a mere vague attempt by the mortgagor to get hold of some shop or other without knowing or caring which one out of the six it is to be. "

The question before me is whether this right of the mortgagee to proceed against the substituted property as being subject of his charge does apply to the case of hypothecation of chattels. In the case of hypothecation of chattels possession is not given to the hypothecatee. If possession is given to the hypothecatee the transaction would become a pledge. In the present case the old bulls which were hypothecated to the defendants were sold by the hypothecator, and he purchased two new bulls, four or five days after the sale of the old bulls, for Rs. 125. The contention of the respondent is that the new bulls having been purchased with the sale proceeds of the old bulls the right of the hypothecatee must extend to the new bulls. A good title can be acquired by a *bona fide* purchaser of bulls without knowledge of the hypothecation—that is

3 (1885) I L R 7 A 436.

very clear from *Narasiah* v. *Venkataramiah* (1) where it is held that the lien of the hypothecatee does not attach to goods sold to a *bona fide* purchaser. *Chidambara* v. *Muthaya* (4) is against the contention of the respondent. In that case *M* pledged his ship to *C* as security for a bond debt of Rs. 1,500, repayable by two instalments. *S* seized the ship in French territory for a debt due by *M* and the French Court sold the ship. *C* made a claim on the proceeds of the sale in the hands of the Court. The Court held that " whether or not his lien was destroyed by the sale of the ship in French territory, *C* was not entitled to any of the proceeds of the sale either at the date of the sale or of his claim in the French Court. " The learned Judges observe at page 333 " Plaintiff had no right whatever in the sale proceeds of the ship at the date of the sale or at the date of the claim made by him which defendant resisted. Those proceeds, in so far as they were more than available for defendant's claim, belong to the Manjirasa. All that plaintiff could claim of Manjirasa was payment at the due date which had not arrived. He could not say of anything belonging to Manjirasa, save what had been pledged to him, that he was entitled to it, or had acquired any right to it. " They also held that the mere fact of the proceeds being in French could not make any difference as to the principle of their decision.

It is clear from these decisions that the mortgagee's right does not attach to the sale proceeds of the property hypothecated.

Mr. Venkatrama Aiyar, who appears for the respondents, contends that the hypothecatee is entitled to pursue his remedy against the property in whatever form it may exist, in other words, he has got the right to go against the proceeds in the hands of the hypothecator. His argument is that if the pledged property is converted into some other property the hypothecatee is entitled to have his charge on the property so converted ; and he relies upon two cases, *Taylor* v. *Plumer* (5) and *Sinclair* v. *Brougham* (6). The case of *Taylor* v. *Plumer* (5) was one of trust. There was a fiduciary relationship between the parties and the factor or the agent converted the goods in his possession into money and security,

1. (1918) I L R 42 M 59 35 M L J 450. 4. (1882) I L R 5 M 330.
5. (1815) 3 M & S 562 : 105 E R 721. 6. (1914) A C 398.

Kandaswami Chetti v. Adimoola Chetti.

and the Court held that the principal was entitled to proceed against such security which was purchased with the proceeds of the principal's goods in the hands of the agent. If it is a case of trust, the trust property can be pursued in the hands of strangers. In the present case there was no trust at all. The judgment-debtor was only a hypothecator and the defendants were only hypothecatees ; and therefore the case of *Taylor* v. *Plumer* (5) has no application to the present case.

In *Sinclair* v. *Brougham* (6) Viscount Haldane in the course of his judgment observed with regard to *Taylor* v. *Plumer* (5) :—" Lord Ellenborough laid down, as a limit to this proposition, that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his banker, the principal had no remedy excepting to prove as a creditor for money had and received. The explanation was, of course, that a relation of debtor and creditor had arisen between the banker and his client the broker, which precluded the notion of following the money. " Mr. Venkatrama Aiyar wanted to rely upon the observations of Viscount Haldane at page 420 wherein he said :—" It is, in my opinion, impossible to confine the right at law to follow to cases where there was a fiduciary relationship. " He wanted to apply that dictum as governing the present case. But at page 419 Viscount Haldane quoted Bramwell, L. J.'s observations in *Ex parte Cooke* (7) which explain the principle of *Taylor* v. *Plumer* (5) :—" Because the money was paid to the broker, not as a trustee in the strict sense of the word, so that no action at law could be maintained against him, and he would only be liable to have a bill filed against him, but was handed to him in fiduciary character, so as not to create the mere relation of debtor and creditor between him and his principal. " Thesiger, L. J. observed in *Re Hallett's Estate* (8), " All cases where it has been held that moneys mixed and confounded, but still existing in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves beyond the ordinary

5. (1815) 3 M & S 562 : 105 E R 721
6 (1914) A C 398.
7 (1876) 4 Ch D 123.
8. 13 Ch D 696.

duty of a man to pay his debts ; in other words, that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee, and *cestui que* trust, or principal and agent."

In this case sale was four or five days before the purchase of new bulls. Since the bulls hypothecated were sold the hypothecatee could proceed against the hypothecator only as a debtor, for the sale gave purchaser a good title and the hypothecatee could not proceed against the bulls in the hands of the *bona fide* purchaser. If the purchaser had notice, no doubt, the hypothecatee could proceed against the bulls, for the purchaser purchased with the knowledge that there was a charge in favour of the hypothecatee against the bulls. But supposing the bulls were sold to a purchaser with such notice can the hypothecatee proceed against the bulls purchased with the sale proceeds of the old bulls ? Mr. Venkatrama Aiyar answers " he has right of election. I do not see how the right of election comes in ; for they were sold to the purchaser with notice of the hypothecation right in which case he cannot proceed against the bulls as well as against the sale proceeds in the hands of the hypothecator. And if the sale was to a person without notice of the hypothecation right the buyer acquires a good title and the hypothecatee can only look to the hypothecator for payment of his money ; in other words, the relationship of debtor and creditor arises the moment the bulls are sold to a person without notice. In this case the bulls were sold four or five days before the new bulls were purchased. I do not think the right of hypothecatee of chattels attaches to goods or chattels purchased with the sale proceeds of chattels or goods mortgaged. No doubt the case would be different if there was a contract that the hypothecatee should have a right against the goods substituted for the goods actually sold. In the case of hypothecation of stock-in-trade of a going concern there is always a term in the deed of hypothecation, or there is a contract, that the hypothecatee should have charge on the goods which are purchased to replace the place of goods sold. No such contract has been proved in this case. Therefore, I have no hesitation in holding that the right of the defendants as hypothecatees does not attach to the bulls purchased by the judgment-debtor partly with the sale proceeds of the bulls hypothecated.

Kandaswami Chetti v. Adimoola Chetti.

In the result, the appeal is allowed, and the judgments of the lower Courts are reversed, and the plaintiff will have a decree.

Both the defendants will pay plaintiff's costs.

The first respondent having been given up the proper order would be : the 2nd defendant who is the 2nd respondent here will pay the costs of this second appeal, and the costs in the lower Courts will be paid by the 2nd defendant and the legal representatives of the 1st defendant.

T. S. V. *Appeal allowed.*

APPELLATE JURISDICTION.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

Pyda Satyarazu ... *Appellant** (*Petitioner*)

v.

The Guntur Cotton, Jute and Paper Mills Company, Ltd. ... *Respondents* (*Respondents*)

Satyarazu v. The Guntur Cotton, Jute and Paper Mills Co. Ltd.

Practice—High Court—Finality of order—Appeal from final order—Company—Winding up—Enforcement of payment of disputed debt—Abuse of process of Court.

With respect to all Courts, more especially Courts of Record, such as the Original Side of the High Court, the order of Court is the order that comes to be embodied in the formal order drawn up and issued by the Court. When the first order of the Court is in the nature of a preliminary order, an appeal against the final order would be held to include any points decided for the purpose of the preliminary order.

If a creditor presents a petition to wind up a company whose insolvency is not admitted, with the object of bringing pressure to bear upon the company and make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Court, the petition for winding up is an abuse of the process of Court and will be dismissed. *In re, London and Paris Banking Corporation*, L R. 19 Eq Cases 445 ; *Tulsidas Lallubhai* v. *The Bharat Khand Cotton Mill Company, Ltd* , I L R 39 B. 47 referred to.

On appeal from the Judgment of the Honourable Mr. Justice Kumaraswami Sastri, dated the 26th day of April, 1923, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. P. No. 136 of 1922.

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* O. S. Appeal No. 62 of 1923. 18th August 1924.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for appellant.

A. Krishnaswami Aiyar for respondents.

In the matter of the Indian Companies Act VII of 1913

and

In the matter of the Guntur Cotton, Jute and Paper Mills Company, Limited

The Court delivered the following

JUDGMENT :—Respondents represent a company called "The Guntur Cotton, Jute and Paper Mills Company, Ltd." The appellant Pyda Satyarazu is the wife of one of the Directors who is also the Secretary of the Company. She is stated to have a mortgage, dated 2nd January, 1918, for Rs. 1,23,354 upon the assets of the firm. Rs. 74,000 out of this sum having been paid towards interest and principal, about Rs. 90,000 remains to be paid. Three suits have been brought in the Guntur Courts which raise questions as to the validity of this mortgage and none of these suits have been finally settled. One is O. S. No. 42 of 1919 on the file of the Additional Sub-Court for accounts in which the appellant's husband was charged with misfeasance in his capacity as Company Director. We are informed that the appeal in this suit is still pending. The other two are O. S. No. 15 of 1923 brought for a declaration that the debt is not binding on the Company, and O. S. No. 21 of 1924, the mortgagee's suit for the enforcement of the terms of her mortgage. In a meeting of December the 30th, 1917, the shareholders passed a resolution terminating the office of Secretary held by the appellant's husband to take effect from the 31st March, 1918. The mortgage in favour of the appellant was executed on the 2nd January, 1918, by the appellant's husband as Secretary of the Company in favour of his own wife and by his brother-in-law. During the pendency of O. S. No. 42 of 1919 the Sub-Court appointed a Receiver. The appellant sent a notice to the Company on the 10th January, 1920 demanding the payment of the balance due on her mortgage with interest within one month. The Sub-Court refused to permit the Receiver to pay up the debt. At a meeting of the shareholders a resolution was passed on the 18th November, 1922 refusing the winding up of the Company and declaring that the appellant was not a

Satyarazu v. The Guntur Cotton, Jute and Paper Mills Co., Ltd.

creditor of the Company. In these circumstances, the appellant and two others applied on the Original Side of this Court for an order for winding up the said Company. Kumaraswami Sastri, J., who heard the petition, upon the Advocate-General who appeared for the Company admitting that there was a sum of Rs. 60,000 belonging to the Company in Court, ordered, that this sum should be paid to the appellant upon her furnishing security for its repayment if she might be ordered to do so in any proceedings in appeal or suit, and he adjourned the matter for some time in order to allow the appellant to produce a statement of accounts showing the exact amount due to her. Upon the adjourned date the learned Judge ordered the Company to pay into Court Rs. 65,000 the amount to stand to the credit of the appellant and to be paid over to her in the event of her being successful in the suit filed by the Company to declare her mortgage to be invalid, and the amount was ordered to be invested meanwhile in War Bonds. Now the appellant appeals on the ground that the learned Judge had no power to alter his first order because the money was not paid into her hands but was allowed to be deposited in Court. The respondents have filed a memorandum of objections in which they maintain that the appellant's petition should have been summarily dismissed.

I will deal with the memorandum of objections first. Mr. T. R. Ramachandra Aiyar has raised the preliminary point that it should have been in form an appeal against the original order of Mr. Justice Kumaraswami Sastriar bearing date 29th January, 1924, and no appeal having been filed against that order, it became final and it was not open to the respondent to attack that order or the grounds thereof, by an appeal against the later order of the 26th of April, and also that in any case any appeal from the order of the 29th January was out of time. With regard to this objection it seems to us sufficient to observe that with respect to all Courts, more especially Courts of Record, such as the Original Side of the High Court, the order of Court is the order that comes to be embodied in the formal order drawn up and issued by the Court, and that secondly, when the first order of Court is in the nature of a preliminary order, an appeal against the final order would undoubtedly be held to include any principles decided for the purpose of the preliminary order.

Satyarazu v. The Guntur Cotton, Jute and Paper Mills Co., Ltd.

As regards the merits the law is perfectly clear that petitions for winding up which are put in order to obtain an unfair advantage over other creditors at a time when the Company is not known to be insolvent amount to an abuse of the process of the Court and should be dismissed, *See* Buckley on *The Companies and Limited Partnerships Act,* para. 4, page 313 In Palmer's *Company Precedents,* para. 2, Chapter III, p. 52, it is stated " It is now well settled that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs. A winding up petition is not to be used as machinery to try a common law action." *In re, London and Paris Banking Corporation* (1) Jessel, M. R. observed " I should be bound by authority (even if I entertained a different opinion which I do not) to hold that if the debt is *bona fide* contested and there is no evidence other than non-compliance with the statutory notice to show that the Company is insolvent, and the Company denies its insolvency (as this company does) I ought to dismiss this petition." Having further found that the petition in that case had not been presented *bona fide,* that is, not with the view of obtaining a winding up order, but with the object of extorting from the Company a larger sum than they thought was fairly due, under pressure of a threat to present the winding up petition, he dismissed the petition with costs. In *Tulsidas Lallubhai* v. *The Bharat Khand Cotton Mill Co., Ltd.* (2) two learned Judges of the Bombay High Court observed that if a party presenting a petition to wind up a company had the object of bringing pressure to bear upon the company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Courts, he commits one of the worst abuses to which the winding up sections of our statute law could be perverted. The learned Judge who heard this petition on the Original Side stated that he could not hold that the claim was a fraudulent one or one made with an indirect motive to establish by a short cut an otherwise unsustainable claim. Without going so far as to say that the claim was a fraudulent one, we feel no doubt in saying that no order for payment should have been made. The debt is disputed ; suits are pending contesting the validity of the mortgage ; the shareholders have passed a resolution denying the status of the appellant as a creditor. She is the wife of one of the Directors, whose conduct has

1. 19 L. R Eq. Cases 445. 2. (1914) I. L. R 39 B. 47.

Satyarazu v. The Guntur Cotton, Jute and Paper Mills Co., Ltd.

been condemned. The Company is not admitted to be insolvent and there is no reason why the appellant, if the amount is due, should not get her remedy in the usual course by obtaining a decree in the suit instituted by her. It is urged on her behalf that the order was made by consent and therefore that the respondents are not in a position to object to it. In the Order it is stated, that the Advocate-General offered to bring the money into Court. I do not think that this implies that he was ready to submit the case of his client to any order that the Court might pass. If he did make any admission that would enable the appellant to abuse the process of the Court, then I think that the learned Judge should not have acted upon it. The only order that can be made upon this appeal and the memo. of objections is to cancel the learned Judge's order for payment of Rs. 65,000 into Court and to dismiss the petition for winding up with costs to be paid to the respondent Company both here and in the Original Court. The memo. of objections is allowed with costs. The appeal is dismissed with costs.

A. V. V. *Memo. of Objections allowed Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

Ayinavalli Narayanamurthi and others *Appellants in both the appeals* (Defdts. 2 to 5)*

v.

Bulusu Achayya Sastrulu and others. *Respondents in both the appeals (Plaintiffs 1 to 5 and 1st defendant).*

Narayanamurthi v. Achayya Sastrulu.

Civil Procedure Code, S. 92—Suit for scheme - Hindu temple—Grant of land —Lands burdened with service—Absolute grant to temple—Dealings by trustees —Evidentiary value of—Scheme—Framing of—Provision for permanent supervision and control by Court—Undesirability of.

Where the question was whether certain lands were granted to a Hindu temple as an endowment or to certain *Archakas* (who were also its trustees) burdened with the service of maintaining the worship of the temple, *held*, that having regard to the inam title-deed describing the lands as "*devadayam*," and the other documentary evidence in the case, the lands were granted to the deity as an endowment and not to the *Archakas*.

The evidence of user and enjoyment, however long, uninterrupted and unquestioned, would be evidence of the grant only in the absence of any reliable or cogent evidence with regard to the terms of the grant itself or in case of any

* Appeals Nos. 275 and 276 of 1921 16th July, 1924.

ambiguity in the grant. The fact that during a long period of time the *Archakas* dealt with the properties as if they were their own, and partitioned them amongst themselves is not of much evidentiary value in the absence of parties or persons interested in setting up the rights of the temple as distinguished from the *Archakas*.

A scheme framed under S. 92 of Civil Procedure Code for a Hindu temple provided *inter alia* for vacancies in the office of trusteeship being filled up by the Court, for the appointment of an auditor by the Court annually, and for the Court sanctioning mortgages or leases of temple properties and a further clause gave general liberty to apply to the Court with regard to any matter arising out of the scheme or modifications thereof. *Held*, that the provisions were objectionable both in principle and in practice. It is not desirable that Courts should assume to themselves the continued supervision of institutions for the management of which they are called upon to frame schemes.

Appeals against the decrees of the Court of the Subordinate Judge of Rajahmundry in O. S. Nos. 42 and 43 of 1918 respectively.

G. Lakshmanna and *K. Ramamurthy* for appellants.

V Ramadoss and *B. Satyanarayana* for respondents.

The Court delivered the following

JUDGMENT:—In the village of Ayinavalli, in a public temple on the bank of Godavari, there is a shrine dedicated to Visveswaraswami. In the village of Mukteswaram, in another public temple also on the bank of Godavari, there is a shrine dedicated to Mukteswaraswami. Both these shrines would appear to have been, if not constructed and established, at any rate endowed by the Peddapur Samasthanam some time in the last years of the 18th century or the beginning of the 19th. Almost from that time, the members of the same family would seem to have been officiating as *Archakas* at both these shrines. Against the five persons at present admittedly holding the office of *Archakaship* in both these shrines two suits have been instituted by the same set of plaintiffs, one in respect of Visveswaraswami temple. Both these suits were instituted under the provisions of S. 92 of the Civil Procedure Code with the sanction of the Advocate-General for, *inter alia*, a declaration that the defendants are not the legal trustees, the removal of the defendants from the office of trustees if they should be found to be legal trustees, the appointment of new trustees, the taking of inventory of accounts and the framing of a scheme for the management of the temples and their properties. For some reason or another at the hearing of the suits the defendants gave up the claim that they were the Dharmakarthas or the trustees of the temples. We apprehend that this abandonment of their

claims as Dharmakarthas or trustees was probably with a view to enable them more successfully to contend that the suit lands were lands belonging to them and not to the deities but to them as *Archakas* subject to the performance of *Nitya Nivedanam* or the daily worship. The main question that has been argued before us is that the lower Court was wrong in holding that the lands were grants to the temples or deities themselves and not to the *Archakas*. For the determination of this question obviously no oral evidence could be of any use and the learned Vakil for the appellants relied for the purpose of contention solely on the documentary evidence in the case. We are, however, constrained to observe in passing that it is to be regretted that suits involving merely the determination of such a simple question should have been pending for three years in the Subordinate Judge's Court and a further period of three years in this Court. It is true that, as contended on behalf of the *Archakas*, the appellants, they have been in possession and enjoyment of the suit lands performing the *Nitya Nivedanam* or the daily worship without accounting and without deeming themselves accountable in respect of surplus income, if any, from the lands to any person. If there were no documentary evidence whatever to indicate in whose favour the original grants were, whether in favour of the deities themselves, that is to say, the temples as institutions or to the *Archakas* subject to or burdened with the performance of the daily worship we should have been disposed to attach considerable weight to such long uninterrupted and unquestioned enjoyment. But the evidence of user and enjoyment however long, uninterrupted and unquestioned, would be evidence of the grant only in the absence of any reliable or cogent evidence with regard to the terms of the grant itself or in case of any ambiguity in the grant. It seems to be clear that almost till very recently the suit lands yielded only just what was sufficient for the *Nitya Nivedanam* or the daily worship. No doubt in such a state of things not only the persons who established the temples and made the endowments but succeeding generations of worshippers would have allowed the *Archakas* to cultivate the lands and take the income performing the *pooja* as it was obviously the most convenient mode of arranging for the worship of the deities and the payment of remuneration for the *Archaka* service. But when the income accruing from the lands came to be considerable

and the *Archakas* by reason of old habits and following their forefathers claimed the lands and surplus profits therefrom to be their own, it was only natural that the worshippers should take steps to secure the surplus income for the institutions. The learned Vakil for the appellants stated his position thus :—" These were small temples. The daily worship had to be carried on and the *Archakas* paid for their services and obviously the most convenient method of arranging for both would be to grant to the *Archakas* sufficient lands, burdened with the obligation of carrying on the daily worship, a simple and single arrangement to achieve both the purposes. The expression *Nitya Nivedanam* includes in itself the idea of remuneration of *Archakas*. No doubt there would be much force in this contention in the absence of any satisfactory evidence regarding the person to whom the grant was originally made. The learned Vakil for the appellants drew out attention to the decrees and transactions relating to the suit lands, by and between the members of the family of *Archakas*, all of them calculated to show that during that entire period, the *Archakas* dealt with the properties as if they were their own, partitioned them amongst themselves and so forth. He relied strongly, for example, on Ex. XL, which was a decree of the District Munsif's Court of Amalapur in a suit of the year 1830, in which, though the suit was dismissed, the properties were, on admission of the parties, treated by the Court as partible properties. Such decrees and transactions however by or between the members or branches of *Archaka* family are not of any evidentiary value in the absence of parties or persons interested in setting up the rights of the temples as distinguished from the *Archakas*. Mr. Lakshmanna at one stage seemed inclined to argue that having regard to the provisions of Clause 2 of S. 62 of Regulation VI of 1816 and the issue of notification thereunder, the judgments of the Courts of Law relating to immoveable properties in these suits may amount to judgments *in rem* ; but he did not press that view and it seems to us that the said provision was one merely intended to evade multiplicity of suits. It seems to us, however, quite clear from the evidence of the public documents adduced in the case that the original grant was really in favour of the temples themselves. The learned Subordinate Judge has in his judgment dealt with all the documentary evidence in detail and come to the conclusion that the grants were to the temples

Narayanamurthi v. Achayya Sastrulu.

and not to the *Archakas*. It seems to us that the evidence in this direction is really overwhelming and conclusive. The inam title Ex. 'N,' dated the 6th of December, 1859, is granted to the manager for the time being of the temple and refers to the grant as *Devadayam* or Pagoda Inam. Ex. 'B,' which is an extract from the inam register of the same period, refers to the deities as grantees and the purpose of the grant as support of the deities and liable to be continued as long as the pagodas are kept up. Exs. D to H are all entitled accounts of the grants of lands pertaining to the deities in the village of Ayinavalli. It is clear from all these documents that the original grants were to the temples themselves and not to the *Archakas*. In this view we entirely agree with the learned Subordinate Judge. This disposes of the main contention on the part of the appellants. The Subordinate Judge has also framed a scheme for the management of the temples, the appointment of trustees, the remuneration of *Archakas* and other matters. In ordinary circumstances we should have thought that one trustee for these small temples would have been sufficient, but as both parties have agreed that it would be more desirable to have three and as we are further assured that there will be no practical difficulty in finding suitable persons in the locality to be appointed as trustees we have not thought fit to interfere with the provision in the scheme. It seems to us, however, that the provision in clause 3 of the scheme for vacancies in the office of trusteeship being filled up by the Court in Clause 6 of the scheme, for the appointment of an auditor every year by the Court and in paragraph 9 for the Court sanctioning the mortgages or leases of the temple properties and in Clause 13 for a general liberty to apply to the Court with regard to any matter arising out of the scheme or the modifications thereof, are objectionable both in principle and in practice. It is far from desirable that Courts should assume to themselves the continued supervision of institutions, for the management of which they are called upon to frame schemes. In fact, under such schemes the Courts of Law constitute themselves in some manner as temple committees and the whole burden of such functions for all time is thrown upon the Courts. It is very undesirable that the Courts should be burdened with such tasks. Even in the interests of institutions themselves, it is doubtful if such provisions are calculated to promote their improvements or efficiency. We are also not satisfied that Courts of Law

Narayanamurthi v. Achayya Sastrulu.

are generally the best fitted to choose proper trustees more especially having regard to the procedurue generally adopted in such cases. Further, we are disposed to consider though in the view we are taking it is unnecessary to decide the point, that such decrees are really *ultra vires* having regard to the express provisions of S. 92 of the Civil Procedure Code, which makes it imperative that for the purpose of getting certain reliefs in respect of public charities, suits should be instituted by persons interested after getting the sanction of the Advocate-General. Though we are aware that several learned Judges of this Court have themselves framed or sanctioned such schemes still it seems to us that such practice should be discouraged and discontinued. Though, however, we disapprove of the provisions of the same enabling or requiring the Court from time to time to appoint trustees, to carry out the auditing of the temple accounts, sanction acts of management, appoint and remove trustees and so forth, still in view of the fact that the legislature is about or likely to pass into law a comprehensive Act dealing with all religious institutions and endowments, we do not consider it necessary to alter the scheme at present, but only direct that as soon as such enactment should be passed, no time or opportunity should be lost by the Court acting under the powers reserved to itself under the scheme to make the necessary alterations in the scheme so as to place the temples under the supervision of such agencies as may be constituted and to rid the Court of much of the functions and duties assumed under the present scheme. With this intimation the appeals are dismissed. The defendants *Archakas* of the temples who have been for such a long time in possession and enjoyment of the suit lands have not been found to have acted *mala fide* and there is no reason to suppose that the defendants in setting up their claims made and believed in by their forefathers before them. In these circumstances we direct that the direction in the decree of the lower Court for the payment of costs of the plaintiffs by the defendants be deleted. The defendants will bear their own costs both in the Court below and in this Court. The plaintiffs' costs here and in the lower Court will be paid as and when the funds permit from such surplus as may remain in the hands of the trustees to be appointed. The memorandum of objections filed by the plaintiffs respondents in this Court are also dismissed, but without any order as to costs.

A. V. V. *Appeals dismissed : Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Srinivasachariar ... *Appellant** (*Petitioner-purchaser*)

v.

Appavoo Reddy *alias* Ayyanna Reddi and others ... *Respondents in both* (*Respondents*).

Srinivasachariar v. Appavoo Reddy.

Civil Procedure Code, 1908, *S.* 63 (2)—*Attachment by Courts of different grades—Sale by inferior Court earlier though attachment by it later—Validity—Subsequent attempt to sell property in execution of a decree of superior Court—Application by purchaser in execution of decree of inferior Court to stop sale—Maintainability—Civil Procedure Code, S.* 47—*Enquiry on application—Scope of.*

Where property attached by a Court of a higher grade is subsequently attached by a Court of a lower grade and is sold by the latter Court in execution of its decree, the sale is under S. 63 (2) of Civil Procedure Code valid and passes title to the purchaser.

Where, subsequent to the sale by the Munsif, the decree-holder in the suit in the Sub-Court applied for the sale of the property in execution of his own decree, *held*, that the purchaser in execution of the Munsif's decree was entitled, under S. 47, Civil Procedure Code, to apply to the Sub-Court to stop the sale on the ground that the title to the property had passed to him and that it had ceased to be the property of the judgment-debtor.

The purchaser in execution of the Munsif's decree is a representative of the judgment-debtor, and the matter is one relating to execution.

Held, further, that on such an application it would be open to the Court to inquire whether the decree of the Munsif was vitiated by fraud or on any other ground.

Appeal against and petition under S. 115 of Act V of 1908 to revise the order of the Court of the Subordinate Judge of Coimbatore, dated 10th March, 1923, in E. A. No. 257 of 1922 in E. P. R. No. 77 of 1922 in O. S. No. 108 of 1919.

T. M. Krishnaswami Aiyar for appellant.

S. S. Ramachandra Aiyar for Respondent.

V. Ganapathi Aiyar for respondent in C. R. P. No. 741 of 1923.

The Judgment of the Court was delivered by

Krishnan, J.

KRISHNAN, J. :—In this case a somewhat novel point arises for decision. There was a decree in the District Munsif's Court against one Bole Reddi and another. The property in question here was attached in execution of that decree. The property had also been already attached by an order of attachment before judgment by the Subordinate Judge of Coimbatore. The

* A A O No. 315 of 1923. (C. R. P. No. 741 of 1923.) 2nd April, 1924.

Srinivasachariar v. Appavoo Reddy.

Krishnan, J.

Subordinate Judge has passed a decree in his suit and the attachment before judgment took effect as an attachment after decree. The property was sold by the District Munsif in execution of the decree in his Court, and has been purchased by the appellant before us. Subsequently the decree-holder in the Subordinate Judge's Court applied to the Subordinate Judge to have the property sold in execution of his decree. Thereupon the appellant here put in a petition to the Subordinate Judge asking that the property should not be sold in execution of his Court decree as it was no longer the property of the judgment-debtor, the title to the property having passed to him by his purchase in the execution of the Munsif's Court decree. The Subordinate Judge rejected this application as being an incompetent application altogether. The appeal is against that order. The Subordinate Judge rightly remarks that the application cannot be treated as an application under O. 21, Rule 58, C. P. C., for that rule is only applicable only when the objection taken is that the property attached is not liable to attachment. In this case, at the time the Subordinate Judge attached the property, it was still the property of the judgment-debtor and no objection could have been raised to the attachment when it was put on the property. The Subordinate Judge then proceeds to say in his order that the present application is not one contemplated by any provision of the Civil Procedure Code and he dismisses it on that ground. We are unable to agree with him. He has quoted the ruling in *Mahadeo Lal* v. *Darsan Gope* (1) as an authority for his position. In that case one of the decrees in execution was a mortgage decree which did not require any attachment to be put on the property. Here we have a case where two Courts have attached the same property in execution of money decrees in each Court. This is a case which falls under S. 63 of the Civil Procedure Code. Ordinarily under clause (1) the Court which should have realized or received such property and determined any claim thereto or any objection to the attachment thereof was the Court of the highest grade, *i. e.*, the Subordinate Judge's Court. But for some reason not clear on the record, it was the Munsif that caused the sale of the property and not the Subordinate Judge. Clause (2), which has been newly introduced in S. 63 says, " Nothing in this section shall be deemed to

1. (1911) 15 C W N 542.

Srinivasa-chariar v. Appavoo Reddy.

Krishnan, J.

invalidate any proceeding taken by a Court executing one of such decrees." It would follow from this clause that the sale by the Munsif in execution of his decree was not invalidated by the fact that the property was under attachment by the Subordinate Judge. The section clearly validates such sales. There was a considerable difference of opinion at one time as to the result of two Courts attaching a property and each selling it itself. It was first held in Madras that the sale of the superior Court even if later in time prevailed and passed the title of the property, the sale by the inferior Court being invalidated. Vide *Muthukaruppan Chetty* v. *Muthuramalinga Chetty* (2). That view was somewhat modified by this High Court in *Kunhayan* v. *Ithukutti* (3), where it was held that the prior sale by the inferior Court would pass title to the property if it had no notice of the proceedings before the superior Court, but if the inferior Court had notice of the proceedings of the superior Court and still proceeded to sell, that sale would be vitiated. The Allahabad High Court seems to have taken a different view altogether, namely, that the sale by the first Court prevailed, whatever the grade of the Court that made the sale may be. The introduction of clause (2) in section 63 of the Civil Procedure Code seems to be intended for the purpose of setting this dispute at rest. It clearly lays down that anything done by the Court executing the decree shall not be deemed to be invalidated because of the existence of the attachment on the property by the superior Court irrespective of any question of notice. That being so, we must hold in this case that the sale by the Munsif passed title to the appellant. Then the question is whether the appellant can adopt any procedure under the Civil Procedure Code to bring to the notice of the Subordinate Judge the fact that the title to the property had already passed to him and stop the sale of it in execution of the Subordinate Judge's decree. The Subordinate Judge says that there is no such provision in the Code, but we think the matter is one which can be brought within the terms of S. 47 of the Civil Procedure Code. The purchaser is certainly a representative of the judgment-debtor even though he is a Court-auction purchaser. See *Veyindramuthu Pillai* v. *Maya Nadan* (4). The appellant was therefore a representative of the judgment-debtor in the suit before the Subordinate Judge and as such representative he

2. (1883) I L R 7 M 47. 3. (1898) I L R 22 M 295 : 9 M L J 1.
4. (1919) I L R 43 M 107 : 38 M L J 32 (F. B.)

was entitled under S. 47 to apply to the Subordinate Judge to stop the sale of the property, on the ground that the title to it had passed to him. That is certainly a matter relating to execution. The words of section 47 being quite wide enough to include such a contention, the Subordinate Judge should have entertained this application. The contrary view was no doubt taken in *Mahadeo Lal* v. *Darsan Gope* (1), but with all respect we are unable to follow the reasoning in p. 544 where the learned Judges say, "We are unable to hold that the present respondent petitioners can be said to be the representatives of the judgment-debtors for the purpose of that section, namely, S. 47. They are, in fact, setting up an antagonistic title based on their purchase." That is not the view that has prevailed in Madras, as the decision of the Full Bench referred to above shows. We are unable, therefore, to follow the ruling in *Mahadeo Lal* v. *Darsan Gope* (1) on that point. The question then is what is to be done in this case? If there are any allegations of fraud in obtaining the decree in execution of which the appellant purchased the property or any other ground which would vitiate the decree itself, it would no doubt be a ground for enquiry. The order of the Subordinate Judge refusing to entertain the petitioner's application must be set aside and the case is remanded to him for a fresh disposal according to law in the light of the observations we have made above. The respondent will pay the costs of this appeal to the appellant. The costs in the Lower Court will be disposed of by that Court.

The Civil Revision Petition is dismissed but without costs.

A. S. V. —— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Rajamanicka Chettiar and another *Appellants** (*Defendants*)

v.

A. Manickam Chettiar (died) and others *Respondents* (*Plaintiff and his legal representatives*).

Hindu Law—Will—Construction—Woman—Bequest to—Estate conveyed—Presumption—"Enjoy" if imports limited estate—Bequest by person having absolute estate—Estate conveyed—No words limiting estate given—Effect.

1. (1911) 15 C W N 542.

* A. A. O. No. 219 of 1923. 11th April, 1924.

Rajamanicka Chettiar v. Manickam Chettiar.

The fact that a legatee is a Hindu woman does not raise any presumption that the estate given to her is only a life-estate. The question whether an absolute estate or a limited estate only was intended to be given must be decided on the language of the will taken as a whole.

The will of a Hindu, who had an absolute estate in the properties purporting to be bequeathed thereby, stated : " The following are the particulars as to how each of the legatees should enjoy after my life-time." It then set out the list of properties which the testator desired his elder sister (*P*) should enjoy, and then of the properties which he desired his adopted sisters, *A* and *V*, and her daughter, *S*, should enjoy. The testator made no provision whatsoever for any gift over or any remainder passing to any one There were no words whatsoever in the will to restrict the scope of the estate given to a life-estate. There were, however, also no words authorising the legatees to alienate the property.

Held, on a construction of the will, that it gave whatever rights the testator had in the properties to legatees, and that was an absolute estate.

The word "enjoy" in the will means " enjoy the benefit of the ownership of property" and not merely the income of the property.

When a person who has got an absolute estate makes a disposition of his properties, unless there is something to indicate that he was limiting the estate given by him in some manner, it is right to take it that he passes the whole of his estate by his gift.

Appeal against the order of the District Court of North Arcot at Vellore in A. S. No. 97 of 1922, dated 12th January, 1923, preferred against the decree of the Court of the District Munsif of Vellore in O. S. No. 1038 of 1922.

S. Varadachariar for appellants.

The Advocate-General (*T. R. Venkatarama Sastri*) and *P. K. Janakiram* for respondents.

The Court delivered the following

Krishnan, J.

JUDGMENTS :—*Krishnan, J.*—The decision of this case turns upon the construction to be put upon Ex. A, the will of one Munirathna Chetty. The question is whether the will confers upon the legatees an absolute estate or only a life-estate. The District Munsif held that the interest conveyed by the will was an absolute one, but the learned District Judge has come to the conclusion that it conferred only a life-estate. The legatees are no doubt Hindu women, but I have already held in *Chidambaratha Goundan* v. *Sellappa* (1) that the fact that the legatee is a Hindu woman does not raise any presumption that the estate given to her is only a life-estate. We have to decide the question on the language of the will as to whether only a limited estate was meant to be given or not. The language of the will in this case is no doubt somewhat peculiar. It says :

1. (1919) 10 L W 620

"The following are the particulars as to how each of the legatees should enjoy after my life-time." It then sets out the list of the properties which the testator desires his elder sister, Papathy Ammal, should enjoy and then of the properties which he desires his adopted sisters, Pachai Ammal and Visalakshi Ammal, and her daughter, Sundaram, should enjoy. It was contended before us that as the testator made an arrangement only for the enjoyment of these properties we must hold that the will intended to give only a life-estate. I am unable to accept the argument for I do not think the word "enjoy" is conclusive of the meaning at all. The learned District Judge thought that the word "enjoy" meant "keep possession of and take the income." But the word "enjoy" might very well be used with reference to properties which are given absolutely and I consider that this word "enjoy" as in the case just referred to in *Chidambaratha Goundan* v. *Sellappa* (1) means "to enjoy the benefit of the ownership of property" and not merely the income of the property. Taking the will, as a whole, the natural meaning seems to be that the testator decided to divide the whole of his properties among the legatees. He made no provision whatsoever for any gift over or any remainder passing to any one. He himself had an admittedly absolute estate, and when a person who has got an absolute estate makes a disposition of his properties, unless there is something to indicate that he was limiting the estate given by him in some manner, it is right to take it that he passes the whole of his estate by his gift. That principle is recognised in S. 8 of the Transfer of Property Act. In this will there are no words whatsoever to restrict the scope of the estate to a life-estate. It may also be pointed out that the testator uses the word "enjoy" with reference to his own rights in the property for, in describing the properties, he speaks of them as "enjoyed" by himself. There is, I think, no reason to give a restricted meaning to the word "enjoy" in this case. It is true that there are no special words authorising the legatees to alienate the property, but those words are quite unnecessary to support an absolute estate. Their absence does not necessarily indicate a limited estate. I agree, therefore, with my learned brother in holding that taking the will as a whole, it clearly gives whatever rights the testator had in the properties to the legatees and that

1. (1919) 10 L. W. 620.

Rajamanicka Chettiar v. Manickam Chettiar.

is an absolute estate. I agree that the appeal should be allowed and the order of the District Judge set aside and the decree of the District Munsif restored with costs in this and in the lower appellate Court.

Odgers, J.

Odgers, J. :—The only point raised in this appeal is the quantum of interest taken by certain legatees by Exhibit A, the will of one Munirathna Chetty. The testator gave some properties first to his elder sister separately and secondly certain properties to Pachai Ammal and Visalakshi Ammal, his sisters by adoption. The word used in both cases is " enjoy" as to the first legacy, "these shall be enjoyed by the said individuals," and with regard to the second, " description of the properties to be enjoyed" by these two ladies. The learned District Munsif came to the conclusion that the interest conveyed by the will was in each case absolute. The learned District Judge, to whom appeal was taken, came to the conclusion that the words meant no more than "keep possession of and take the income," so that the effect of the will was to give a life-interest only to each of the legatees. Now it seems to me to be well settled by the recent decisions of this Court that the fact that a legatee is a Hindu woman does not now raise any presumption against her taking an absolute estate. In *Chidambaratha Goundan* v. *Sellappa* (1) my learned brother Krishnan, J. held that the rule that when a Hindu gave property to a Hindu woman and more particularly to a Hindu widow there is a presumption that the estate meant to be given is only a life-estate has been held in recent cases not to apply now in this presidency. I had occasion to consider this matter very recently in A. A. O. No. 311 of 1922 when I came to the same conclusion. Therefore, the sole question to be considered is whether the words used are in the language of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao* (2) of "sufficient amplitude" to convey in the terms of the gift itself absolute rights of ownership. It is objected that, in the present case, we have no words conferring on the legatee a right to alienate, etc. It is said that the word "enjoyment" must be construed in a strictly limited sense. This is deduced from the fact that in enumerating the properties the testator describes each as " in enjoyment, having been purchased from, " so and so. This to my mind only shows the way in which he became entitled to those properties. It is not probable that a tes-

1. (1919) 10 L W 620. 2. (1922) I L R 45 M. 320 : 43 M L J 78 (P. C.)

tator should say, "shall enjoy having received under this my will," or something of that sort which would be strictly analogous to the expressions used by the testator in this will with reference to himself. I think, therefore, that nothing really turns on that argument. It is not disputed that the testator had full power to dispose of these properties as he pleased. He had not any near male relations since the construction of the will is now contested by a reversioner. There is no disposal in remainder of the testator's admittedly absolute interest unless it is disposed of to these legatees. There is to my mind a presumption that a man means to give all that he has got, unless by expressions he has used and other surrounding circumstances, a different intention can be inferred. I do not see any ground for drawing such an inference here. The words are somewhat similar to those occurring in A. A. O. No. 311 of 1922 already referred to and in which I held that the word "enjoy" was capable of conferring an absolute estate. The case most strongly relied on by the respondent is that reported in *Charlapathi Chunna Cunniah* v. *Cota Nammalwariah* (3). In considering that case, it is very important to bear in mind the observations of Ramesam, J. in *Kanakammal* v. *Baktavatsulu Naidu* (4) that the case in *Charlapathi Chunna Cunniah* v. *Cota Nammalwariah* (3) was decided at a time when the trend of Madras decisions above referred to against limiting estates to females was not well established. This is clearly seen from the judgment itself.

In *Charlapathi Chunna Cunniah* v. *Cota Nammalwariah* (3) the learned Judges said that " although the circumstances of the legatee being a widow, the absence of words of inheritance or words authorising alienation are not in themselves sufficient to restrict the estate : those circumstances may be taken into consideration in construing the other provisions of the will" This, in my view, led the learned Judges in *Charlapathi Chunna Cunniah* v. *Cota Nammalwaraiah* (3) to construe the word "enjoy" in a limited sense. It may be added that the learned Judges themselves do not seem to be very confident as to the correctness of their decision. I am of opinion that there is no ground here to restrict the meaning of the word "enjoy" to a life-estate and adhering to my decision in A. A. O. No. 311 of 1922. I would construe the terms of this will as an intention

3. (1909) I L R 33 M. 91. 4. (1922) 44 M L J 23.

Rajamanicka Chettiar v. Manickam Chettiar.
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Odgers, J.

to confer an absolute estate on all the legatees. In this view, the decision of the learned Judge is wrong and the appeal must succeed and the decree of the District Judge set aside and that of the District Munsif restored with costs here and in the Lower Appellate Court.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Duraichami Tevar ... *Appellant* * (*Plaintiff*)

v.

Adimuthu Nadan and another ...*Respondents* (*Defendants*).

Duraichami Tevar v. Adimuthu Nadan.

Civil Procedure Code, S. 11—Parties and representatives—Decision in suit by mortgagee against purchaser of hypotheca—Subsequent suit against person deriving title under former purchaser.

A suit by a mortgagee to enforce his mortgage as against a purchaser of the hypotheca was dismissed on the ground that the mortgage had been paid off. In a subsequent suit by the plaintiff to enforce the mortgage against a person who had purchased the hypotheca from the defendant in the previous suit but prior to the institution of that suit, *Held*, that the decision in the prior suit was not *res judicata* and did not bar the subsequent suit *Mussan Haji* v. *Thiyan Thavara Koran*, (1921) 41 M. L. J. 392 referred to

Second appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in A. S. No. 5 of 1921 preferred against the decree of the Court of the Principal District Munsif of Manamadura in O. S. No. 398 of 1917.

S. R. Muthuswami Aiyar for appellant.

Adimuthu Nadan and Muthusami Nadan for respondents.

The Court delivered the following

JUDGMENT :—Plaintiff's suit was to enforce a mortgage executed by the 1st defendant in his favour. The 2nd defendant in the case was the purchaser of this hypotheca from one Ramaswami Thevan who himself purchased it from the 1st defendant. The plaintiff's case has been dismissed by both the Lower Courts on the ground that it is barred by *res judicata.* The facts necessary for appreciating this ground of *res judicata* are mentioned in para. 3 of the appeal judgment. In 1913 the plaintiff instituted a suit against Ramaswami Thevan to recover Rs. 800. It was pleaded in that suit that there was an adjustment of accounts between the parties and in that adjustment the

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* S. A. No. 1393 of 1921. 10th July, 1924.

Duraichami Tevar v. Adimuthu Nadan.

payment of Rs. 122 relied upon went towards the discharge of the present mortgage claim. Eventually that suit was dismissed. It was stated on behalf of the contesting defendant that since the matter of discharge of the present claim was considered in the previous suit and it was found to have been discharged, the claim cannot be adjudicated again in this case by the plaintiff. It appears to me that this argument is not sound. The 2nd defendant's purchase of the hypotheca under Ex. III was long before the suit and it cannot be said that in that suit his interests were represented ; the decision, therefore, cannot be considered to be binding on him. It is unnecessary to discuss this question *in extenso* as the matter has been dealt with in a series of decisions. One decision of the Madras High Court that I would refer to is that reported in *Anakkaran Puthiavalappil Mussan Haji* v. *Thiyan Thavara Koran and others* (1). There it was held that a lessee under a lease granted before a suit brought by or against his lessor is not bound by the decision therein against the latter if he (the lessee) was not himself a party to the suit. I think the principle of that decision applies to this case also. The same view is found enunciated in *Joy Chandra Banerjee* v. *Sreenath Chatterjee* (2); see also *Ramchandra Dhondo Kulkarni* v. *Malkapa Bin Narsapa Devare and others* (3).

I hold, therefore, that the decision of the lower Court that the plaintiff's suit is barred by *res judicata* is wrong. I set aside the decision and remand the case to the first Court for disposal according to law. The appellant will have his costs in this Court. As regards the costs in the lower Courts they will abide the result. The appellant is entitled to get the refund of the Court-fee.

Appeal allowed and case remanded.

A. V. V.

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1. (1921) 41 M. L. J. 392
2. (1904) I L R 32 C. 357 at 361.
3. (1916) I L R 40 B. 679.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

P. S. K. Haji Sait Muhammad Abdul Gaffur Rowther and another ... *Appellants** (*Defendants* 1 *and* 2)

v.

K. E. S. Muhammad Samsuddin Rowther and others ... *Respondents* [*Defendants* 3 *and* 4 *and L. Rs. of Plaintiff* (*deceased*).]

Muhammad Abdul Gaffur Rowther *v.* Muhammad Samsuddin Rowther.

Civil Procedure Code, S 2 (12)—Mesne profits—Nature of—Basis of calculation—Burden of proof—Lands in the possession and cultivation of defendant—Allegation of cultivation at a loss for successive seasons—What plaintiff should prove.

When mesne profits are claimed from a person the onus of proving what profits might with diligence have been received in any year lies upon the party claiming mesne profits, but the onus of proving what profits the person in wrongful possession actually received lies on the person in possession.

Mesne profits are in the nature of compensation or damages. In any case the proper measure to be awarded is to be determined by what the party in possession actually receives or recovers except in cases where it is or can be shown that what is so received or recovered falls below what would have been so recovered or received with due diligence.

Where in a suit for mesne profits it was found that the defendant was directly in possession during nine consecutive seasons and suffered considerable loss throughout, he cannot be said to be dealing with the land with due diligence ; for, if the lands had been let out, they would have fetched some rent, however low it may be. In such a case the person claiming mesne profits must let in some affirmative evidence with regard to the amount for which they might have been reasonably let out. In the absence of such evidence, mesne profits cannot be ascertained

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in E. P. No. 722 of 1920 in O. S. No. 70 of 1916.

C. V. Anantakrishna Aiyar for appellants.

K. Rajah Aiyar for respondents.

The Court delivered the following

Spencer, Offg. C. J.

JUDGMENTS :—*Officiating Chief Justice.*—The onus of proving what profits might, with due diligence, have been received in any year lies upon the party claiming mesne profits, but the onus of proving what profits the person in wrongful possession actually received lies upon the person in possession. Vide *Ramakka v. Nagesana* (1). The best evidence of the profits derivable from the cultivation of a particular field in any given

* Appeal No. 312 of 1921. 3rd September, 1924.

1. C. M. A. Nos. 411 and 401 of 1921.

Muhammad Abdul Gaffur Rowther *v.* Muhammad Samsuddin Rowther.

Spencer, Offg. C. J.

year is the evidence as to the actual yield in that year *minus* the cost of cultivation. But such evidence, in order to be useful, must be exact, and it is always open to the party out of possession to falsify the accounts as to the number of measures of grain gathered at the harvest or the price prevailing when they were sold or the cost of cultivation. He may also adduce evidence to prove that the occupant was not diligent and might have got greater profits by proper diligence. In the absence of evidence as to actual profits, the next best evidence is evidence as to possible profits, of which evidence as to yield of similar adjoining lands in the year in dispute is an example. In the present case the petitioners did not prove that any particular items of the defendants declared accounts of the yield of lands kept under direct cultivation were incorrect, but they relied on the circumstance that for nine seasons there had been a net loss upon these lands as itself so highly improbable as to warrant the rejection of all the defendants' accounts on the ground that no man in his senses would go on cultivating the same land year after year, at a loss, although every one is liable to losses in particular bad seasons. The yield of the suit lands in other years, which the Subordinate Judge has adopted as the yield for the years in dispute, is not such a good guide as evidence as to the yield of neighbouring lands of similar quality in these years would be, and is open to the objection that as regards the lands under lease, which are not kept separate, the leases are better evidence of the profits.

The plaintiffs failed to produce such evidence. The only course for the Court to adopt under these circumstances was to disallow mesne profits upon the lands under direct cultivation on account of the absence of any evidence as to what they might have yielded and the incredibility of the defendants' story that they did not actually yield any profit at all and to award mesne profits upon the leased lands only.

I, therefore, agree in the order proposed to be made in my learned brother's judgment.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—The only question that arises in this appeal relates to the mode of ascertainment of mesne profits. The suit is one for partition instituted by the daughter now dead and represented by her legal representatives of a deceased Mahomedan against her brothers and others for her share in their father's estate and for mesne profits.

Muhammad Abdul Gaffur Rowther v. Muhammad Samsuddin Rowther.

Srinivasa Aiyangar, J.

The proceedings from which this appeal has been preferred relate to the mesne profits of the agricultural lands from the date of the plaint. A Commissioner was appointed to take evidence and report on the amount of mesne profits and he, in his report, fixed the sum of Rs. 3,561-14-6 inclusive of interest as the amount of mesne profit payable by defendants 1 and 2 to the plaintiff's representatives. On objection taken to the Commissioner's report by both the parties, the matter came up before the Subordinate Judge of Tuticorin who awarded to the plaintiff's representatives the sum of Rs. 5,033-1-6 and interest thereon. Defendants 1 and 2, who have been found liable for this latter amount, have preferred this appeal.

At the enquiry before the Commissioner the plaintiff adduced no evidence whatever. The defendants, however, produced several account books and also examined a number of witnesses. The learned Subordinate Judge has rejected entirely the evidence of these account books on the ground that in his opinion they had been specially fabricated by the defendants with a view to defeat and defraud the plaintiffs. The two circumstances that he relies on for coming to that conclusion are: firstly, that the defendants, at any rate, after the institution of the suit, knew that they would some day be held accountable for mesne profits and that they had, therefore, a strong motive for fabricating false accounts; and secondly, that the accounts of the khas or direct cultivation of certain lands by the defendants shows that such direct cultivation has, strangely enough, in almost every season during the accounting period, resulted not in profit but considerable loss. This latter circumstance is undoubtedly calculated to raise a great deal of suspicion. But that alone even coupled as it may be with the existence of strong motive would not be sufficient to discredit the account books altogether. It must be observed that the plaintiffs have not challenged the accounts in any other manner or sought to show by an examination of the accounts of cross-examination of witnesses to bring out any aspects or characteristics of the account books on which it may be found that the account books are not genuine. The Subordinate Judge, after rejecting the account books entirely, practically brushed aside the whole of the Commissioner's report and proceeded to assess mesne profits himself not on the basis of any figures available for the period in question but on the basis of figures found for a previous period by a former Commissioner appointed in the suit.

Muhammad Abdul Gaffur Rowther v. Muhammad Samsuddin Rowther.

Srinivasa Aiyangar, J.

A considerable portion of the lands were lands let out to tenants even during the accounting period ; and the agreements executed by the tenants in respect of the lands so leased out have all been produced and filed. In fact, so far as the rents recovered from these lands are concerned, both parties were clearly agreed that the plaintiff's representatives would be entitled to their proper share in the rents so realised. There was, therefore, no reason whatever for the Subordinate Judge to reject altogether the available figures in respect of the lands leased out.

We are clearly of opinion that the plaintiff's representatives would be entitled to their seventh share of the amounts found by the Commissioner as recovered from the tenants in respect of the lands leased out during the nine periods of cultivation in question. As this account has not been separately made up, the matter might have to be referred to the lower Court for the taking of such accounts if the parties here should be unable to agree in the same.

As regards, however, the lands which have been directly cultivated by the defendants during the period the net result of the cultivation in nearly all the periods has been shown to be considerable loss. The question arises in this connection whether the claimant for mesne profits in such cases is entitled merely to a share of the actual profits received or recovered by the person in possession, and, if not, what the true measure of mesne profits should be. The point to start from is that mesne profits are in the nature of compensation or damages. Their Lordships of the Judicial Committee have observed in the case of *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (2) that mesne profits are in the nature of damages which the Court may mould according to the justice of the case. In the case of *Midnapnr Zamindari Co., Ltd.* v. *Kumar Naresh Narain Roy* (3) their Lordships of the Judicial Committee refer to mesne profits as compensation to the plaintiff for the exclusive use of the land by the other party. The damages are for the wrongful withholding of possession or exclusion from possession of the party entitled thereto or found to be so.

The definition of mesne profits in the Civil Procedure Code, Sec. 2, clause 12, itself contains a clear indication as to what

2. (1900) I L R 27 C 951 at 967. 3. (1924) 47 M L J 23 (P. C.).

Muhammad Abdul Gaffur Rowther v. Muhammad Samsuddin Rowther.

Srinivasa Aiyangar, J.

the true measure of mesne profits is. It lays down that "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom; that is to say, if, in respect of any particular property, the Court should find that profits received or recovered by the party in possession do not amount to what with ordinary diligence he might have received from the property, then the true measure is what would have been so received with due diligence, or, in other words, what the party in possession actually receives or recovers is the proper measure except in cases where it is or can be shown that what is so received or recovered falls below what would have been so recovered or received with due diligence.

As it is conceivable that in respect of certain lands the party in possession might have cultivated with the diligence and with regard to others without such diligence, the question can be decided only with regard to each item of property.

Applying these principles to the lands under the direct or khas cultivation of the defendants themselves, we find that in all the nine seasons to which the accounting relates, the defendants are said to have not only not recovered any profits but suffered considerable loss, the expenses being alleged to be far in excess of the yield. We cannot, therefore, treat this kind of dealing by the defendants with certain lands as dealing with due diligence. The very facts clearly show that these lands have not been managed by the defendants with that amount of due diligence, which is indicated in the definition of mesne profits. It is clear that if the lands had been let out, they might have fetched, if not large rents as in the other cases, at least some low rent.

We are, therefore, left to find out the mesne profits in respect of all the lands under the khas or direct cultivation of the defendants by determining what rent or income they would or could have fetched in those seasons if they had been let out by the defendants to strangers. It was incumbent on the plaintiffs to adduce some affirmative evidence with regard to the amounts for which these lands might have been reasonably let in the particular seasons or years by the defendants. See judgment in *Ramakka* v. *Nagesana* (1)

1. A A O Nos. 411 and 401 of 1921.

Muhammad Abdul Gaffur Rowther v. Muhammad Samsuddin Rowther.

Srinivasa Aiyangar, J.

in this Court not yet reported. No such evidence whatever has been adduced. There is some evidence to the effect that all the lands that could be let were leased out by the defendants and that only the other lands were cultivated by them directly. There is, therefore, no material whatever from which the amount of mesne profits in respect of these lands could be ascertained. There is also no principle or warrant for burdening the plaintiff's representatives who were admittedly out of possession with any losses alleged to have been sustained by the defendants in the course of their khas or direct cultivation of lands which must have been carried on without due diligence.

The best course, therefore, in these circumstances would be to strike out from the account of mesne profits all the figures relating to the khas or direct cultivation of some of the lands by the defendants themselves and take only the lands leased out to tenants to ascertain the share to which the plaintiff's representatives would be entitled to therein. It seems to us that these figures could be easily worked out and agreed to by and between the parties themselves in this Court and in order to see whether they are in a position to do so, this case will be posted again for orders after the lapse of 10 days. If the parties, however, are unable to agree, the case will have to be sent back to the Lower Court for the figures being worked out on that basis.

As both parties have partially succeeded and partially failed, there will be no order as to the costs of this appeal and each party will pay and bear his or their own costs in this Court.

T. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Ramasubbu Nayaker ...*Petitioner** (*Appellant in Appeal No.* 170 *of* 1924 *on the file of the H. C.*)

v.

Dorai Raj *alias* Muniandi Naicker (minor) by Rangammal, guardian ...*Respondent* (*Respondent in do.*)

Ramasubbu Naicker v. Dorai Raj.

Registration Act, S. 77—Suit for compulsory registration—Decree in—Appeal—Power of Appellate Court to direct stay of registration.

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* C M P No. 1646 of 1924. 22nd April, 1924.

Ramasubbu Naicker, v. Dorai Raj.

Where in a suit under S.77, Registration Act, the plaintiff gets a decree directing the Registrar to register a particular document within 30 days after the passing of such decree, the section does not prevent a Civil Court which has power to hear an appeal against the same from staying the execution of the decree under the Civil Procedure Code. In such a case if the appeal ultimately fails, the document can be presented for registration within 30 days from the disposal of the appeal. *Gopinath Adhikary* v. *Gadadhar Das*, I. L. R. 33 C. 1021 followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of further proceedings in execution of the decree of the Court of the Subordinate Judge of Ramnad at Madura, dated 31st March, 1924, in O. S. No. 27 of 1923 pending disposal of Appeal No. 170 of 1924 preferred therefrom to the High Court.

C. Krishnaswami Rao and *T. Nallasivam Pillai* for petitioner.

A. Venkatrayaliah for respondent.

The Court made the following

ORDER :—This is an application for stay of the execution of a decree pending the disposal of a First Appeal (unnumbered). Mr. Venkatrayaliah, on behalf of the respondent, has taken notice of this application for stay and has very strongly opposed the stay on the ground that S. 77 of the Registration Act is imperative and that the document must be presented within 30 days of the decree of the Subordinate Judge's Court. In other words, his contention is that this Court has no power to stay the execution of the decree and that if it does stay the non-presentation of the document within 30 days would make the document useless. I am unable to accept this contention. Sec. 77 of the Registration Act provides for the filing of a suit by a person who wants to get the document registered and for asking for relief and the relief that he asks is that the Registrar may be directed to register this document within 30 days after the passing of such order. This does not prevent a Civil Court which has power to hear an appeal against the order made by the lower Court from staying the execution of the decree under the Civil Procedure Code and I wish to make it clear that the order which I make on this application will not in any way prejudice Mr. Venkatrayaliah's client. Mr. Krishnaswami Rao has drawn my attention to a case reported in *Gopinath Adhikary v. Gadadhar Das* (1) in which this question is incidentally considered.

1. (1906) I L R 33 C 1020 at 1021.

Ramasubbu Naicker v. Dorai Raj.

McLean, C. J. held that there was no objection to a document being presented after the disposal of the appeal provided that it was presented within 30 days from the disposal. In a matter like this, where the decision of the First Court is not final, it cannot be said that the document must be presented within thirty days from the decision of the First Court. It may be that the defendant may fail here and succeed on appeal to the Privy Council or the appellant may succeed here and the respondent may succeed on appeal to the Privy Council. Sec. 77 refers to the final decision of a Civil Court and not to the decision of a Court whose judgment is likely to be reversed on appeal. I, therefore, hold that the objection of Mr. Venkatrayaliah fails and I direct that the execution of this decree as to registration be stayed pending the disposal of the appeal. In other words, the registration of the document will be stayed pending the disposal of the appeal There will be no stay as regards the rest of the decree.

T. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

Karnati Munayya — *Appellant* (Plaintiff)*

v.

Mitta Krishnayya, minor by his guardian Mitta Balanna (*vide* Order, dated 2-11-1921 on C. M. P. No. 1043 of 1921) and others — *Respondents (Defendants Nos. 1 and 3 and legal representatives of 2nd defendant).*

Karnati Munayya v. Mitta Krishnayya.

Hindu Law—Guardian—Sale of minor's property—Validity—Portion of sale price agreed to be left with vendee to be paid by him to the minor on his attaining majority—Vendee executing bond therefor—Sale if rendered invalid thereby—Vendor's lien if lost by reason of such arrangement.

A guardian of a minor sold property of the minor, and, as part of the transaction of sale agreed that the purchaser should withhold one-third of the entire purchase-money and keep it in his hands till the minor attained majority. Simultaneously with the sale, the purchaser executed a bond to pay the balance of the purchase-money on demand by the minor immediately after he attained majority.

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* Appeal No. 105 of 1921. 18th July, 1924.

Karnati Munayya v. Mitta Krishnayya.

In a suit brought by the minor on attaining age to set aside the sale, it was argued, *inter alia,* that the deposit of the balance of the sale price with the vendee indicated that there was no immediate necessity for the sale and that it was an imprudent transaction as the minor's guardian ran the risk of the vendee becoming insolvent before the minor came of age.

Held, that the circumstances of the case amply justified the sale by the guardian, and that it was not invalid on account of the arrangement entered into as regards the balance of the sale price.

Per Officiating Chief Justice :—The arrangement as to the balance of the sale price did not put an end to the vendor's statutory lien therefor.

Krishnaswami Aiyangar v. *Subramania Ganapatigal,* 35 M L J 304 considered.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Cuddapah in O. S. No. 33 of 1920 (O. S. No. 54 of 1919 on the file of the District Court of Cuddapah).

A. Krishnaswami Aiyar for appellant.

S. Srinivasa Aiyangar and *S. V Narayana Aiyar* for respondents.

The Court delivered the following

Spencer, Offg. C. J.

JUDGMENTS :—*The Officiating Chief Justice* :—The plaintiff, whose suit was dismissed in the lower Court, appeals. The suit was brought to set aside a transaction of sale entered into by the plaintiff's guardian during his minority. The plaintiff's guardian was his mother and it appears that his maternal uncle, Narayya, assisted his mother in business transactions. The sale deed (Ex. VII), which is attacked, is a sale of a house in Proddatur for Rs 4,300 in which the minor has a one-third share. Owing to the death of his father, after division had taken place between the plaintiff's step-brother on one side and the plaintiff and his father on the other side, during the lifetime of the father, the plaintiff's share of the house, at the time of the sale, was two-thirds. The price being Rs. 4,300, two-thirds of this amounts to Rs. 2,866. The Judge has found that there was justifiable necessity for about half the sum, Rs. 770 being due upon a mortgage incurred by the plaintiff's father, Rs. 93, being due on a simple debt, Rs. 40 for the plaintiff's father's funeral expenses, and about Rs. 450 for the marriage expenses of the plaintiff's sister. It is not now suggested that any fraud on the part of the plaintiff's guardian has been proved. But it is argued by Mr. Krishnaswami Aiyar that there was no justification for selling this property when the debts due by the family might have been defrayed by a mortgage or by other means; and secondly, it is argued that the

Karnati Munayya v. Mitta Krishnayya.

Spencer, Offg C J.

deposit of Rs. 1,433 of the sale price with the vendee indicates that there was no immediate necessity for selling the minor's share and that it was an imprudent transaction as the minor's guardian ran the risk of the vendee becoming insolvent before the minor came of age. The Subordinate Judge has carefully considered the circumstances of the sale and he has found on the first issue that the sale was not an imprudent alienation, that the price was reasonable, and that the vendee acted *bona fide.* An important consideration in this case is that the minor not having become divided by metes and bounds from his step-brother had only an undivided share in this house. Some property had to be sold in order to raise money to pay off the debts, instead of allowing them to increase by accumulation of interest. Owing to the house being undivided it had to be sold as a whole as nobody would give a proper price for an undivided share. The plaintiff's half-brother joined in the sale and it is not suggested that he was unmindful of his own interest or was ready to accept a smaller price than what the house was worth for his share of the purchase-money. More than one attempt was made to sell the property. On the first occasion the plaintiff's maternal uncle himself offered bids in order to raise the price and when it was sold for a price that was considered insufficient, he bought it back again, and again put it up for sale. All these are circumstances which indicate that the sale was a *bona fide* transaction arranged by the plaintiff's guardian to meet the necessities of paying her husband's debts Simultaneously with the sale, the purchaser executed a bond (Ex. B.) to pay Rs. 1,433 in all on the plaintiff's demand immediately after he attained majority the interest meanwhile was fixed at 6 per cent. which was the rate of interest secured by the discharged mortgage document.

It is argued that it was an improper act on the part of the minor's guardian to leave any part of the purchase-money in the hands of the purchaser. One consequence of so doing was that the minor's guardian was prevented from embezzling or wasting the cash which ought to come to the minor. The question has been considered in several cases, whether in such a case where a purchaser separately covenants to pay the purchase-money or part of it at a future date, the vendor loses his lien for the unpaid purchase-money. In the case reported in *Krishnaswami Aiyangar* v. *Subramania Ganapatigal* (1)

1. (1917) 35 M L J 304.

Kainati Munayya v. Mitta Krishnayya.

Spencer, Offg C. J.

two promissory notes were executed as part of the consideration for the sale and it was held by the learned Judges who decided that case that the vendor lost his lien for the unpaid purchase-money. Phillips, J., who delivered the judgment of the Court, observed that when there is a separate agreement for payment of part of the purchase-money in lieu of actual cash, it is a question of the intention of the parties whether the agreement is accepted as a collateral security or whether it is a substitution for the statutory right, which every vendor has by reason of S. 55 (4) of the Transfer of Property Act, to have a lien for the unpaid purchase-money. On the facts of the case it is not for us now to say that it was wrongly decided because that must have been upon the view which the Court took of the intention of the parties. In *Webb* v. *Macpherson* (2) the Privy Council pointed out that under S. 55 of the Transfer of Property Act it is only in the absence of a contract to the contrary that the seller does not retain his lien upon the property for recovery of the purchase-money. Therefore the question in every case is whether the contract excludes the operation of the charge. This will be so whether the charge is one created by a statute as in India or arises out of equity as in England. Halsbury's *Laws of England*, Vol. XIX, page 30, makes it clear that everything depends upon the intention of the parties. I can find nothing in the transaction under Ex. B to indicate that there was any understanding between the plaintiff's guardian and the purchaser Venkatasubbayya that the latter should get the property unencumbered by any lien for the unpaid purchase-money. The parties seem to have considered it necessary that there should be some collateral agreement, like Ex. B, in order to make it clear that the unpaid portion of the purchase-money should be payable to the minor after he attained majority. There is nothing in the terms of this document or in the sale deed to indicate an intention to put an end to the vendor's statutory lien. The guardian's conduct in entering into the transaction was not such as to justify any reflection being cast upon it on account of this arrangement. I am of opinion that the Subordinate Judge was right in upholding the transaction and dismissing the suit. The appeal must be dismissed with costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree with my Lord the Chief Justice. I only wish to add that the strongest ground on

2. (1903) I L R 31 C 57 : 13 M L J 389 (P C).

Karnati Munayya v Mitta Krishnayya.

Srinivasa Aiyangar, J.

which Mr. Krishnaswami Aiyar relied for asking us to set aside the sale was that as part of the transaction between the guardian of the minor and the purchaser it was agreed that the purchaser should withhold one-third of the entire purchase-money and keep it in his hands till the minor should attain majority. This he argues is clear and cogent evidence that there was no necessity for the alienation at any rate to the extent of the amount that was agreed to be detained in his hands. If it stood alone, undoubtedly a Court of law would have hesitated before it refused to set aside such a transaction. It is not merely evidence that there was no necessity for the amount which was agreed to be detained by the purchaser but it was argued that it also showed that the amount that was necessary might have been raised otherwise. However, in this case, there are various circumstances which weigh on the other side. To begin with, the mortgage of Rs. 770 was not only upon the suit house but also upon all the other immoveable properties of the minor. The release of the other properties from this encumbrance was undoubtedly a benefit to the estate of the minor. This house itself barely 15 feet in breadth though not actually divided by metes and bounds was divided into three parts, the elder son's share being the middle, and the two-thirds that accrued to the minor being on either side of this share. Therefore, there was a house which had necessarily to be sold at some time or other. The elder brother was willing there and then to join in the sale. It is also clear that some moneys were required to pay off the unsecured debts and a sum of Rs. 400 for meeting the expenses of the marriage of the minor's sister. I do not think it would have been a prudent transaction to seek to sell only one share of the minor's property. Nobody would have purchased it. No doubt a Court has to decide not only with regard to the kind of alienation but also with regard to the *quantum* of alienation. But considering all the circumstances, it seems to me to be perfectly clear that this transaction was not such as should be set aside. We should also bear in mind that the purchaser was a stranger and not a relation of the parties. No fraud or collusion has been alleged or proved. The circumstances clearly show that the guardians of the minor were not anxious to handle any moneys of the minor. No doubt it may be argued, as it was, that the mere fact that for his own protection the pur-

Karnati Munayya v. Mitta Krishnayya.

Srinivasa Aiyangar, J.

chaser stipulated to retain in his hands a sum of Rs. 1,400 and odd showed that he was conscious that the transaction was questionable or was capable of being questioned. But having regard to the large number of claims in Courts every day to set aside alienations we cannot accuse any purchaser, if he was overcareful. It has often been said that the test for a Court in considering whether a transaction by a guardian on behalf of the minor should be set aside or not would be to see whether the transaction was such as a man of ordinary prudence would have had in respect of his own property. That undoubtedly is not an accurate statement of the law. It is too broadly stated. But at any rate, that clearly indicates one limit, namely, that no Court will uphold a transaction which it considers that a man of ordinary prudence would not have had, in respect of his own property. The other limit I should like to lay down somewhat in this way. Suppose at the time of the transaction the guardians, who acted actually, were guardians appointed by the Court and they made an application to the Court for sanctioning a particuluar transaction, were the circumstances such as the Court would consider justifiable for the purpose of sanctioning the transaction ? It is perfectly clear that, if, in these circumstances, a Court would have sanctioned a transaction, it must be deemed to be a transaction which no Court of Law would or should set aside. Even applying this principle, I am satisfied that in this case the circumstances were such that, if an application had been made to the Court for sanctioning the sale of the two-thirds share of the minor in this property, a Court of Law would have sanctioned it. It is in evidence that for three days public auctions were held and this property was attempted to be sold. There was no purchaser and all the circumstances indicate that by the sale of this property the necessary amount was sought to be raised as it was the best thing to do, the elder brother of the minor, the mother and the maternal uncle, all of them admittedly acting *bona fide* in the interests of the minor, concerned in the sale. I, therefore, agree that the sale sought to be set aside should not be set aside. The appeal, therefore, fails, and I agree to the order proposed by my Lord the Chief Justice.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE JACKSON.

Mannam Latchayya ... *Appellant** (*Plaintiff*)

v.

Surabathuni Kotamma and another ... *Respondents* (*Defendants* 1 *and* 2).

Latchayya *v.* Kotamma.

Appeal—Finding adverse—Appeal from—Decree in favour of party—Effect—Finding not res judicata.

A party in whose favour a decree has been passed cannot appeal against the decree merely on the ground that the finding on one of the issues is against him. Such a finding will not be *res judicata.*

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Guntur in A. S. No. 36 of 1921 (A. S. No. 603 of 1920 on the file of the District Court of Guntur) preferred against the decree of the Court of the Additional District Munsif of Guntur in O. S. No. 75 of 1918 (O. S. No. 549 of 1916 on the file of the Principal District Munsif's Court, Guntur).

Ch. Raghava Rao for appellant.

C. Sambasiva Rao for respondents.

The Judgment of the Court was delivered by

Devadoss, J.

Devadoss, J. :—In this appeal the question is whether the appeal to the Court below was competent or not. The 2nd defendant was the appellant before the lower appellate Court. The suit was brought by the plaintiff alleging that he was the adopted son of Ramaswami. The 1st defendant is Ramaswami's widow and the 2nd defendant her brother's daughter. The 1st defendant set up a gift in favour of the 2nd defendant. The District Munsif found against the alleged adoption and found in favour of the alleged gift, but held that the gift was not valid. The 2nd defendant appealed against that finding of the District Munsif, and the Subordinate Judge held that the gift was valid. The plaintiff prefers this Second Appeal and contends that the 2nd defendant was not competent to prefer an appeal against a decree which was in her favour inasmuch as the District Munsif had dismissed the plaintiff's suit with costs.

This point is covered by very clear authorities so far as this Court is concerned and there is no reason to depart from

*S A No. 81 of 1922. 5th August, 1924.

Latchayya v. Kotamma. — Devadoss, J.

them. In *Secretary of State* v. *Saminatha Koundan* (1) it was held that a party in whose favour a decree was passed could not appeal against the decree on the ground that the finding on one of the issues was against the party. In *Venkatasuryanarayana* v. *Sivasankara Narayana* (2) the learned Chief Justice and Seshagiri Aiyar, J., held the same view. In *D. Narasamma* v. *D. Kannaya* (3) and in *Muttukumarappa* v. *Arumuga Pillai* (4) the same view was held. In *Jamait-un-nissa* v. *Lutf-un-nissa* (5) the Full Bench held that a party not aggrieved by a decree was not competent to appeal against the decree on the ground that an issue was found against him.

Mr. Sambasiva Rao, who appears for the defendant, relies upon *Ranganatham Chetty* v. *Lakshmi Ammal* (6). That is a judgment of the learned Chief Justice and Mr. Justice Oldfield in which there is an observation (at page 383) which supports the defendant's case. But the decision in *Secretary of State* v. *Saminatha Koundan* (1) was not brought to the notice of the learned Judges, and they rest their decision upon another point. Therefore the observation with regard to this point can only be considered as *obiter*. The decisions in *Yusuf Sahib* v. *Durgi* (7) and *Ramakrishna Naidu* v. *Krishnaswami Naidu* (8) do not materially help the respondent. It is urged by the respondent that the finding of the District Munsif that the gift was not valid might be *res judicata* between the plaintiff and the 2nd defendant in some future litigation. The opinion of the majority of the Judges of this Court is against the view that it is *res judicata*. But there is the decision in *Ramakrishna Naidu* v. *Krishnaswami Naidu* (8) in which two learned Judges of this Court held that such a decision would be *res judicata*. Mr. Raghava Rao states that he would not rely upon the decision on the point as *res judicata* in any future litigation so far as this point is concerned. That being so, we do not think that the 2nd defendant would be affected by the finding of the District Munsif in any future litigation that may arise between her and the plaintiff.

We allow the appeal, but inasmuch as the plaintiff (appellant) did not raise this point before the lower Courts, disallow costs.

A. S. V. *Appeal allowed.*

1. (1911) I L R 37 M 25 : 21 M L J 947.
2. (1917) 17 M L T 85, 86.
3. (1881) I L R 4 M 134.
4. (1883) I L R 7 M 145.
5. (1885) I L R 7 A 606.
6. (1913) 25 M L J 379.
7. (1907) I L R 30 M 447 : 17 M L J 260.
8. (1918) 36 M L J 641.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

Hazarat Kibulai Sayyed Gulam Gouse Sha Sahib Kadiri ... *Petitioner* (Respondent in Appeal No. 135 of 1923 on the file of the High Court)*

v.

Dost Mohammad Khan Sahib (dead) and another ... *Respondents (Appellants in do.).*

Sayyed Gulam Gouse Sha Sahib Kadiri *v.* Dost Mohammad Khan Sahib.

Civil Procedure Code, S. 92 and O. 22 R. 3—Scheme suit—Appeal—Death of one of the relator appellants—Effect of—Abatement.

Where during the pendency of an appeal against a decree in a suit under S. 92, Civil Procedure Code, one of the plaintiff-appellants dies, there is no abatement resulting from such death. *Parameswaran Munpee* v. *Narayanan Nambudiri* I L R 40 M 110 ; *Alagappa* v. *Muthiah,* I L R 41 M 237 followed ; *Chhabile Ram* v. *Durga Prasad,* I L R 37 All 296 at 298 dissented from.

An application for dismissal of the appeal on the ground the appeal had abated by reason of such death does not come within the scope of O. 22, R. 3, Civil Procedure Code.

Petition praying that in the circumstances stated in the affidavit filed therewih the High Court will be pleased to dismiss with costs Appeal No. 135 of 1923 preferred to the High Court against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 33 of 1922.

C. Vinayaka Rao for petitioner.

P. R. Ganapathi Aiyar for respondent.

The Court made the following

ORDER :—*Parameswaran Munpee* v. *Narayanan Nabudiri* (1) is a direct authority for the view that a suit once instituted by two or more plaintiffs duly authorised under S. 92, Civil Procedure Code, does not abate in consequence of one of the plaintiffs dying during the continuance of the suit.

It seems to us that the case of one of two or more appellants dying after the filing of an appeal against a decree in a

1. (1916) I. L. R. 40 M 110 : 31 M L J 279.

*C M P No. 1504 of 1924. 9th July, 1924.

Sayyed Gulam Gouse Sha Sahib Kadiri v. Dost Mohammad Khan Sahib.

suit of the nature referred to in S. 92 is an *a fortiori* case of abatement not resulting from the death of a party.

The observations in *Chhabile Ram* v. *Durga Prasad* (2) to the effect that it is necessary that there should be two persons interested in the trust and holding the Advocate-General's sanction for *carrying on the litigation* have not been accepted by the Bench which decided the case in *Parameswaran Munpee* v. *Narayanan Nambudiri* (1) and in view of the strict interpretation which has been put upon the expression " instituted " by Sir Lawrence Jenkins in *Darves Haji Muhamad* v. *Jainudin* (3), we do not think that they should be followed. *Alagappa* v. *Muthiah* (4) is an additional authority for the correctness of the view taken by this Court in *Parameswaran Munpee* v. *Narayanan Nambudiri* (1), which we have decided to follow (*vide* the judgment of Sadasiva Aiyar, J., at pages 239-240). The present application does not come within the scope of O. 22, R. 3 (1), Civil Procedure Code, which deals only with applications made by legal representatives of deceased plaintiffs. Rule 3 (2) deals only with the result of such applications not being made within the time limited by law on the interest of the deceased plaintiff.

This application is dismissed with costs.

The regular appeal will be posted for hearing in due course.

T. S. V. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Basina Appanna *Petitioner* (Complainant)*

v.

Peta Akkanna *Respondent (Accused).*

Basina Appanna v. Akkanna.

Penal Code, S. 499—Defamation—Accused if must actually utter defamatory words—Use of such words by another and accused adopting them if enough—

1. (1916) I L R 40 M 110 : 31 M L J 279.
2. (1915) I L R 37 All 296 at p. 298.
3. (1906) I L R 30 B 603.
4. (1917) I L R 41 M 237 : 33 M L J 173.

*Cr R C No. 859 of 1923
(Cr R P No. 687 of 1923) 14th July 1924.

Married woman—Imputation of unchastity to—Complaint by husband—Right of—Penal Code, S. 499—Criminal Procedure Code, S. 198—Effect. Appanna v. Akkanna.

To be guilty of the offence of defamation it is not necessary that the accused should himself have actually uttered the words complained of. Where another person uses defamatory words purporting to repeat what the accused himself had told him, and the accused, who is present at the time, by his conduct and by a few words which he speaks intends to give and does give the impression that he adopts the words of that other as his own, the accused is guilty of the offence of defamation. By assenting by conduct and suggestion to what he himself is reported to have said, the accused in effect utters the words imputed to him.

Where a married woman is defamed by imputation of unchastity, her husband is a person aggrieved under S. 198, Criminal Procedure Code, and has the right to prefer a complaint of defamation.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Ganjam Division in Criminal Appeal No. 8 of 1923, preferred against the judgment of the Court of the Sub-divisional Magistrate of Chicacole in C. C. No. 59 of 1922.

S. Subramania Sastri for petitioner.

B. Pocker for respondent.

The Court made the following

ORDER :—The first question to be decided in this case is, is the evidence of P. W. 5 true ? The learned Sessions Judge has not said that he disbelieves his evidence. The witness was the Vakil of the accused himself in the proceeding in connection with which the defamatory words in question were said to have been used. No ground has been shown for rejecting his evidence. If his evidence is believed, is there sufficient material on which a conviction for defamation can stand ? P. W. 5 advised the accused to compromise the Civil Suit between P. W. 1 and the accused. Thereupon he replied "There are other reasons for the dispute. I shall disclose them in private." Then one Ramanujayya, who was listening to the conversation, said, "There is nothing else. It appears that there is intimacy between P. W. 1's wife and the accused and hence the accused says that P. W. 1 has been trying to trouble the accused." And P. W. 5 proceeds to say :— "I warned the accused that he should not give vent to such language since it is defamatory and he would be legally liable.

Appanna v. Akkanna.

The accused replied that he would not be faulty by exposing P. W. 1 when he was trying to bring loss to his credit. Then I went away." It is argued on behalf of the accused that the words complained of were not actually uttered by him. This contention, though literally true, does not avail the accused at all. By his conduct and by a few words which he did speak he undoubtedly intended to give and gave the impression that he adopted as his own the words reported to P. W. 5. I am not in the least prepared to hold that merely because the accused did not himself utter the words complained of he can escape liability for defamation. The *Explanation* 3, for instance, to S. 499, Indian Penal Code, by way of analogy throws some light upon the question in controversy :—"An imputation in the form of an alternative or expressed ironically, may amount to defamation." In this case by assenting by conduct and suggestion to what he himself was reported to have said the accused in effect uttered the words imputed to him. I must disagree with the Sessions Judge and hold that the offence of defamation has been made out.

It was next argued that the person defamed was the complainant's wife and that the complainant had no right to initiate the prosecution. *Brahmanna* v. *Ramakrishnama* (1) was relied on in support of this proposition. This case, however, related to a civil action and it was held that the injury caused to the husband was remote and not immediate and that although imputation of unchastity on the part of plaintiff's wife caused him pain of mind, that did not give him a right to claim damages. But in the present instance we are not concerned with the civil rights of the parties and the authorities bearing on this subject clearly establish that where a married woman is defamed by imputation of unchastity, her husband is a person aggrieved under S. 198 of the Code of Criminal Procedure. In other words, the combined effect of S. 499 of the Indian Penal Code and S. 198 of the Criminal Procedure Code is, that the husband of the woman to whom unchastity is imputed has the right to prefer a complaint of defamation. See *Chellam Naidu* v. *Ramaswami* (2), *Chotalal Lallubhai* v. *Nathabhai Bechar* (3) and *Anantha Goundan* v. *King-Emperor* (4).

1. (1894) I L R 18 M 250 5 M L J 89.
2. (1891) I L R 14 M 379 : 1 M L J 242. 3. (1900) I L R 25 B 151.
4. (1904) 15 M L J 224.

I am acting in revision and as I cannot convert the finding of acquittal into one of conviction, all that remains to be done is, to send the case back to the present Sessions Judge to re-hear the appeal and dispose of it according to law in the light of the observations I have made. Appanna v. Akkanna.

A. S. V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Garapati Narasimudu and others *Appellants in both** *(Defendants 3 to 5)*

v.

Pinnamaneni Basava Sankaram, minor, represented by mother and next friend Rattamma and others . *Respondents in both* *(Plaintiff and defendants 1 and 2).*

Provincial Insolvency Act (V of 1920), Ss. 2 and 27—Joint Hindu family—Father adjudged insolvent—Sons' interest if vests in Official Receiver—Suit for partition by son—Maintainability of—Sale of property by Official Receiver prior to passing of vesting order by Court—Rights of purchaser—Order vesting property in Official Receiver—Ratification—Title by estoppel—Transfer of Property Act, S. 43. Narasimudu v. Basava Sankaram

Where a father in a joint Hindu family consisting of himself and his sons is adjudicated an insolvent, it is not merely the share of the father but the share of his undivided sons also that vests in the Official Receiver. That does not prevent a son from bringing a suit for partition of his share as against the Official Receiver or persons claiming under him, on the ground that the father's debts were illegal or immoral and that the father could not convey his share validly for such debts.

The Official Assignee of Madras v. *Ramachandra Aiyar,* I L R 46 M 54 not followed. *Kuppuswami Goundan* v. *Marimuthu Goundan,* (1924) 47 M L J 487 followed.

In the absence of an order by the District Court vesting the property of the insolvent in the Official Receiver, the property vests in the Court and not in the Receiver.

Kavali Sankara Rao v. *Ramakrishnayya,* 46 M L J 184 ; *Vythilinga Padayachi* v. *Ponnuswami Padayachi,* 41 M L J 78 referred to.

Where the Official Receiver purported to sell the property of an insolvent before the passing of such a vesting order and subsequently the District Court on being appraised of the fact, passed an order vesting the property in the Receiver, the title of the vendee becomes complete either on the principle of

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*S A Nos. 100 and 101 of 1923. 8th September 1924.

Narasimudu v. Basava Sankaram.

ratification by the Court of the act of its agent or on the principle embodied in S. 43 of the Transfer of Property Act.

Subba Aiyar v. *Ramaswami Aiyangar,* 40 M L J 209 ; *Sankaranarayana Pillai* v. *Rajamani,* 46 M L J 314 relied on.

Second Appeals and Memorandum of Objections preferred against the decrees of the Court of the Subordinate Judge of Masulipatam in A. S. Nos. 13 and 44 of 1922 respectively, preferred against the preliminary and final decrees of the Court of the Additional District Munsif of Gudivada in O. S. No. 159 of 1920.

S. Varadachariar and *N. Rama Rao* for appellants.

V. Ramadoss and *V. Krishna Mohan* for respondents.

The Court delivered the following

JUDGMENT :—Plaintiff is the son of the 2nd defendant. The 1st defendant is the Official Receiver of Masulipatam. Defendants 3 to 5 are vendees of the plaint property from the 1st defendant. The plaintiff has brought this suit for declaration that the sale by the 1st defendant of the plaintiff's share of the property to defendants 3 to 5 is invalid and for a division by metes and bounds of his share of the property. The plaintiff's case is that the 2nd defendant, his father, was leading an immoral life and that he contracted debts for purposes which could not bind the plaintiff, his undivided son, and that the Official Receiver had no right to sell his share of the property to the defendants 3 to 5. The 2nd defendant applied to be adjudicated an insolvent on 24th January, 1918. His petition was referred for disposal to the Official Receiver on 31st January, 1918. The 2nd defendant was adjudicated insolvent on 15th July, 1918. The Official Receiver held an auction sale of the property of the insolvent on 25th August, 1918, and executed a sale deed in favour of the defendants 3 to 5 on 12th September, 1918. The plaint was filed on 27th June, 1919. The District Munsif gave a preliminary decree in favour of the plaintiff and passed a final decree. On appeal the Subordinate Judge of Masulipatam held that the Official Receiver had no right to sell the property inasmuch as on the date of the sale the property did not vest in him and dismissed the appeal of the defendants 3 to 5. The District Munsif found that the debts of the 2nd defendant were not tainted with illegality or immorality. The Subordinate Judge held that the Official Receiver purported to sell the whole of the property including the son's share.

Narasimudu v. Basava Sankaram.

Mr. Varadachariar who appears for the appellants contends that the whole property vested in the Official Receiver and under the law the Official Receiver is entitled to dispose of the whole property including the son's share and that by the vesting order of 1st February, 1921, any defect in the title of the Official Receiver was cured. An objection was taken that as the property did not vest in the Official Receiver the sale by him was bad. There are decisions of this Court which held that there must be an order by the District Court vesting the property in the Official Receiver otherwise, the Official Receiver has no right to deal with the property. Under S. 27 of the Provincial Insolvency Act (Act V of 1920), on the making of an order of adjudication, the whole property of the insolvent vests in the Court and till the Court appoints a Receiver of the property under S. 56 of the Provincial Insolvency Act the property does not vest in him. In this case no such order was passed by the District Court till 1st February, 1921. The judgment of the District Munsif was delivered on 9th February, 1921. The question in this case is whether the Official Receiver could give a good title to the vendee. It is admitted that on the date of the sale the property did not vest in him, no order to that effect having been passed by the District Court. It is urged by Mr. Varadachariar that the property of the insolvent vested in the District Court and therefore the plaintiff could not sue for a declaration of his right. It was held by the learned Chief Justice and Coutts Trotter, J. in *Official Assignee of Madras* v. *Ramachandra Aiyar* (1) that "where the managing member of a joint Hindu family consisting of himself and his sons is adjudicated an inoslvent, the interest of the sons does not vest in the Official Assignee by reason of the adjudication, although it would be competent to the latter to deal with their shares if the debts of the insolvent were of such a nature as to be binding on their interest." Mr. Varadachariar's contention is that there is a difference between the law as contained in the Provincial Insolvency Act (Act V of 1920) and that contained in the Presidency Towns Insolvency Act (Act III of 1909) so far as this point is concerned and that S. 52 of the Presidency Towns Insolvency Act gives power specifically to the Official Assignee to exercise and take proceedings for exercising all such powers in or over or in respect of property as

1. (1922) I L R 46 M 54 43 M L J 569.

Narasimmudu v. Basava Sankaram.

might have been exercised by the insolvent for his own benefit; and that such a provision as that contained in S. 52, not being enacted in the Provincial Insolvency Act, it must be assumed that what vests in the Official Receiver is not only the property of the insolvent but the property of the undivided Hindu son as well. I was at first inclined to uphold this contention as the definition of the word 'property' clearly includes not only the property of the insolvent but all the property over which he could exercise a right for his own benefit and a Hindu father can sell for his own debt his undivided son's share. Though a literal interpretation of the definition of the word 'property' in S. 2 of the Provincial Insolvency Act V of 1920 may be favourable to the appellants' contention yet sitting as a single Judge I felt bound to follow the decision in *The Official Assignee of Madras* v. *Ramachandra Iyer* (1). But before I delivered the judgment in the case, I came across in 20 L. W. a short note of the recent decision of the learned Officiating Chief Justice and Srinivasa Aiyangar, J. in A. S. No. 139 of 1921*. I sent for the decision and as I found that the learned Chief Justice dissented from the ruling in *The Official Assignee of Madras* v. *Ramachandra Aiyar* (1), I had the case posted for further argument and heard it with reference to that ruling. The learned Officiating Chief Justice and Srinivasa Aiyangar, J. held that what vests in the Official Receiver is not only the share of a Hindu father but also the share of his undivided son which he could alienate for his own debt. Following that decision I hold that the share of the plaintiff did vest in the District Court. This does not prevent a son from bringing a suit for partition of his share on the ground that the father's debt was illegal or immoral and that the father could not convey his share validly for such a debt. S. 27 of the Provincial Insolvency Act V of 1920 applies only to suits by creditors of the insolvent. A suit by a person who is not a creditor and who claims independently of the insolvent is not barred by the provisions of the Indian Insolvency Act.

In this case the Official Receiver purported to sell the son's share also. That is the finding of the Subordinate Judge and that is also the plaintiff's case as set out in para. 7 of the plaint. The contention for the respondent is that the Official Receiver could not convey the property which did not vest in him and that the vendees did not get a good title. On

1. (1922) I L R 46 M 54 : 43 M L J 569.

*Since reported as *Kuppuswami Goundan* v. *Marimuthu Goundan* (1924) 47 M L J 487.

Narasimudu v. Basava Sankaram.

the date of the sale the property of the insolvent including that of the son's share was vested in the District Court. On 1st February, 1921 the District Court passed an order vesting the property in the Official Receiver. Two points are urged for the appellant—(1) that the sale being by an agent of a principal who afterwards ratified it, is good, (2) though the property did not vest in the Official Receiver before the date of sale yet it vested in him after the sale and under S. 43 of the Transfer of Property Act the vendees get a good title. As regards the first contention, it is urged on behalf of the respondent that under S. 200 of the Contract Act a principal could not ratify an act to the prejudice of third persons. The Official Receiver is an Officer of the Court and acts on behalf of the District Court. As a rule the District Court by an order vests the property of the insolvent in the Official Receiver. In this case such an order was not passed, although the District Court transferred the petition of the insolvent for disposal. When the District Court was appraised of the fact that it was necessary that it should pass an order vesting the property in the Official Receiver it passed such an order on 1st February, 1921. Before the order was passed, the Official Receiver sold the property to the appellants. Where a person who acts ordinarily as an agent *bona fide* thinking that he has a right to act for the principal conveys the property of the principal it is open to the principal to ratify such act and thereby give a good title to the vendee. If an agent acts without authority and thereby prejudices the rights of third persons, the ratification by the principal would not validate the act. But where the principal's property is alienated, and the only person that could be prejudiced is the principal himself, S. 200 does not stand in the way of such an act being ratified by the principal. In *Subba Aiyar* v. *Ramaswami Iyengar* (2) it was held that a sale by the Official Receiver before the vesting order was valid. The learned Judges observed that the Official Receiver is an agent of the District Court and that his act is valid. No doubt in that case they relied upon the general terms of the order as giving power to the Official Receiver to deal with the property though there was no subsequent order vesting the property. In this case there is an order subsequent to the sale, vesting the property in the Official Receiver. This decision is quoted with approval in *Sankaranarayana Pillai* v.

2. (1920) 40 M L J 209.

Narasimudu v. Basava Sankaram.

Rajamani (3). Phillips, J. observes with reference to the case in *Subba Aiyar* v. *Ramaswami Iyengar* (2) "accepting this case as an authority for the proposition that the Official Receiver can act as agent it is clear that the subsequent ratification by the Court would make the proceedings valid." The respondent relies upon two cases, one in *Kavali Sankara Rao* v. *Ramakrishnayya* (4) and another in *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (5) as supporting his contention that in the absence of vesting order before the date of sale the Official Receiver could not give a valid title to the vendee from him. But in those two cases, there was no vesting order. It is well settled that there should be an order by the District Court vesting the property of the insolvent in the Official Receiver otherwise the property of the insolvent would not vest in him. The two cases relied upon by the respondent do not conflict with the decisions in *Subba Aiyar* v. *Ramaswami Iyengar* (2) and *Sankaranarayana Pillai* v. *Rajamani* (3). In this case the order of the District Judge vesting the property in the Official Receiver is sufficient ratification of his act so as to give a good title to the appellants.

The second contention of the appellants is entitled to considerable weight. By the vesting order the property of the insolvent actually vested in the Official Receiver. In other words what vests by reason of section 27 of the Provincial Insolvency Act in the District Court is made to vest in the Official Receiver and the vendee from the Official Receiver at a time when the property did not vest in him can claim the benefit of S. 43 of the Transfer of Property Act when the property vests in him. Supposing an agent sells the property of his principal when he had no right to convey the property and if subsequently the principal conveys that property to the agent, the vendee will get good title by reason of S. 43 of the Transfer of Property Act. In this case the property of the insolvent vested in the Official Receiver on 1st Feb. 1921, and the appellants are entitled to rely upon that fact and set up their right against the plaintiff. It is contended on behalf of the respondent that on the date of the filing of the plaint, the appellants had no title to the property. But the order of the District Court was passed before the judgment was delivered by the District Munsif in favour of

2. (1920) 40 M L J 209.
3. (1923) I L R 47 M 462 : 46 M L J 314.
4. (1923) 46 M L J 184.
5. (1920) 41 M L J 78.

Narasimudu v. Basava Sankaram.

the respondent. I hold that the appellants have derived a good title from the Official Receiver and in the light of the findings of the lower Courts, the plaintiff is not entitled to a decree for partition inasmuch as his share has been validly conveyed by the Official Receiver to the appellants. In the result the appeals are allowed and the plaintiff's suit is dismissed, but considering the fact that the Official Receiver sold the property before it vested in him I think this is a fit case where both the parties should be made to bear their own costs throughout. The Memorandum of Objections is dismissed.

A. V. V. *Appeals allowed*
Memo. of objections dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

K. C. Nagasami Aiyar *Appellant** (*Plaintiff*)

v.

N. Ramasami Aiyar and others *Respondents* (*Defendants*)

Nagasami Aiyar v. Ramasami Aiyar.

Trusts Act, S. 90—Co-owners—Joint patta land—Default in payment of Government revenue by owner of one plot—Purchase at revenue sale by joint pattadar—Purchaser if a trustee for defaulter—Collector—Powers of, with reference to revenue sales—Notice to persons affected by order—Necessity for.

Plaintiff and defendant were owners of separate plots of land comprised in a joint patta. Owing to their default in the payment of Government revenue, the plaintiff's land was sold in public auction and purchased by the defendant. Though there was nothing fraudulent in the conduct of the defendant, the plaintiff claimed the benefit of the defendant's purchase under S. 90 of the Trusts Act. *Held,* that the plaintiff and defendant were not co-owners within the meaning of S. 90 of the Trusts Act ; that it could not be said that the defendant in his capacity as co-sharer contrived to bring the property of the plaintiff to sale ; and that the plaintiff's suit was not maintainable. The Collector is the final authority in the matter of confirming sales held for arrears of Government revenue and the Deputy Collector has only a delegated authority in the matter. Though the Collector is ordinarily bound to give notice to the party affected before confirming a revenue sale overruling the order of the Deputy Collector to the contrary, the omission to give such notice is not fatal especially when it is not shown that the aggrieved party had any valid grounds to urge before the Collector.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Madura in A. S. No. 91 of 1920 (A. S. No. 179 of 1920, District Court, Madura) preferred against the decree of the Court of the Second Additional District Munsif of Madura in O. S. No. 230 of 1917.

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*S A No. 292 of 1922. 25th September, 1924.

Nagasami Aiyar v. Ramasami Aiyar.

C. V. Anantakrishna Iyer for appellant.

The Advocate-General, K. Rajah Aiyar and *K. V. Srinivasa Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The first point urged for the appellant in this Second Appeal is that the purchase by the 1st defendant enured for the benefit of the plaintiff as well, and that he is, therefore, entitled to a decree, so far as his share is concerned. The finding is that both the plaintiff and the 1st defendant defaulted to pay the Government revenue, in consequence of which the Revenue authorities brought the plaintiff's properties to sale, and it was sold in auction. The contention of Mr. Anantakrishna Aiyar for the appellant is that the plaintiff and the 1st defendant are co-owners, that by the default of the co-owners the property was sold, that taking advantage of his position as such the 1st defendant bought the property and that, therefore, S. 90 of the Trusts Act applies to this case. In the first place I am not satisfied that the word 'co-owner' applies to the case of joint pattadars who are ryotwari tenants. The plaintiff is the owner of specific items of property, and the mere fact that the patta stands in the joint names of himself and one or two others would not make the other persons co-owners with the plaintiff within the meaning of S. 90 of the Trusts Act. It is urged that there is a joint liability to pay the Government revenue and that that joint liability makes them co-owners. In my opinion it is only an accident that the patta stands in the names of two persons who are entitled to different items of property and who have no community of interest between them. In this case no doubt the plaintiff and the 1st defendant happen to be relatives, but there are cases in which persons who have nothing to do with one another happen to own property for which patta stands either in the joint names of both or in the name of one of them or in the name of a third person. In such cases, if the owner of some specific items makes default in paying the Government revenue, the Government is entitled to bring any one of the items mentioned in the patta, in respect of which a default in payment of revenue is made, to sale, and this circumstance, in my opinion, will not make joint pattadhars or persons, who own lands separately but for which the patta is joint co-owners. Reliance is placed upon an observation in *Faizar Rahman* v *Maimuna Khatun*(1)

1. (1913) 17 C W N 1233.

Nagasami Aiyar v. Ramasami Aiyar.

for the position that the plaintiff and the 1st defendant are co-owners. There is no definition given of co-owners, but in all the cases which have been cited at the Bar I find that co-owners are persons who own property jointly, that is to say, there was no division by metes and bounds of the shares of the different owners. In the case in *Faizar Rahman* v. *Maimuna Khatun* (1) the persons who made default in payment of the revenue due to Government were co-owners with the persons whose shares were afterwards sold. S. 90 of the Trusts Act applies only to cases of tenants for life, co-owners, mortgagees and other qualified owners of property who avail themselves of their position as such in gaining an advantage in derogation of the rights of other persons interested in the property. In that view I do not think that the decision in *Deo Nandan Prasad* v. *Janki Singh* (2) helps the appellant. In that case their Lordships of the Privy Council held that, if one co-owner makes default in payment of Government revenue and if the object be to bring the share of the other co-owners to sale and afterwards to buy the property himself, such a sale, though good, would enure, for the benefit of the owner of the share which has been sold. They also observe that it is not necessary that there should be actual fraud proved in order to enable the co-sharer whose share has been sold in auction in a Revenue sale to claim the benefit of the purchase by another co-sharer, but from their judgment it is clear that the person who takes advantage of his position as a co-sharer must have done something in that capacity, that is *qua* co-sharer, to bring the property of the other co-sharer to sale. In this case the finding is that both the plaintiff and the 1st defendant defaulted to pay the Government revenue, and there is no finding that the 1st defendant by any act or illegal omission on his part brought the plaintiff's property to sale. That being so, I do not think the plaintiff can claim from the 1st defendant the property which he purchased in Court auction. The auction was a public one, and the 1st defendant and the plaintiff's brother were present. Under the Revenue Law it was open to any defaulter to buy the property. It was open to the plaintiff to buy the property, as it was open to the 1st defendant to buy it. In these circumstances it cannot be held that the purchase by the 1st defendant enured for the benefit of the plaintiff.

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1. (1913) 17 C. W. N. 1233.
2. (1916) I L R 44 C 573 (P C).

Nagasami Aiyar v. Ramasami Aiyar.

The next point urged by Mr. Anantakrishna Aiyar is that the Collector had no power to set aside an order made by the Deputy Collector. But on this point the law is quite clear. The Collector is the final authority on matters of this kind, and he is the person who has to dispose of such matters. The Deputy Collector has only delegated authority, and the Collector has power to set aside or confirm the order of the Deputy Collector. I do not think this contention is tenable.

The last contention is that the Collector did not give notice to the plaintiff when he set aside the order of the Deputy Collector. I must observe, as was fairly conceded by the learned Advocate-General, that in every case in which an order is made against a party, notice should have been given to that party before such order is made, whether the order is made by a Revenue authority or by a judicial authority. I think it is a salutary principle that notice should be given to a person before an order is made against him. In this case the Deputy Collector set aside the sale but the Collector afterwards confirmed the sale. The plaintiff has not proved that he could have urged any matter before the Collector which could have induced him to pass an order different to that which he has passed. It appears from the evidence that the plaintiff was aware of the order, but he did not apply to the Collector to have the order reviewed. The Collector set aside the order of the Deputy Collector solely on the ground that the reason given by the Deputy Collector was not one of the reasons contemplated by the Revenue Recovery Act. The Deputy Collector set aside the sale on the ground that there was no proper bid. That is not a reason for which a sale could be set aside. If the plaintiff could show that he had very good grounds which he could have urged before the Collector I would be inclined to hold that the plaintiff was prejudiced by his not being given notice before the Collector passed his order. But in the circumstance of the case it cannot be said that he was in any way prejudiced, because from the evidence it appears that he could have urged no ground successfully against the order of the Collector. On this ground, I think, this objection is not tenable.

In the result, the Second Appeal fails and is dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

K. M. K. R. K. R. Ramanadhan Chettiar by his agent Rama Aiyar *Appellant* in both (Petitioners)*

v.

P. L. V. V. R. Subramania Chettiar and another *Respondents (Respondents).*

Ramanadhan Chettiar v. Subramania Chettiar.

Provincial Insolvency Act (V of 1920), S. 51 (1)—Assets realised after the date of the admission of the insolvency petition—Sale held before such date—Rights of execution creditor.

The expression "date of the admission of the petition" occurring in S. 51 (1) of the Provincial Insolvency Act qualifies "assets realised" and therefore only assets realised before the date of the admission of the petition will enure to the benefit of the execution creditor.

Meaning of the expression "assets realised in the course of execution" considered.

Appeals against orders of the District Court of Coimbatore in I. A. Nos. 312 and 313 of 1922 in I. P. Nos. 58 and 57 of 1922 respectively.

T. M. Krishnaswami Aiyar for appellant.

S. Ranganatha Aiyar for respondents.

The Judgment of the Court was delivered by

Madhavan Nair, J.

MADHAVAN NAIR, J. :—The facts of this case are not disputed. In execution of a decree against the 2nd respondent his properties were brought to sale on the 27th of June, 1922, and the auction-purchaser deposited 25 per cent. of the sale proceeds in the District Munsif's Court at Tiruppur. On the 1st of July, 1922 an insolvency petition was filed against the 2nd respondent and the Official Receiver was appointed *interim* Receiver on the 4th July, 1922. The balance of the purchase-money was deposited on the 11th of July, 1922 and the 2nd respondent was adjudicated an insolvent on the 15th of September, 1922. In the meanwhile, the sale proceeds of the 2nd respondent's properties were forwarded to the Official Receiver by the District Munsif. On the 26th of July, 1922 an application was filed before the District Judge of Coimbatore by the creditor who attached the properties and brought them to sale for the re-transfer to the District Munsif's Court of Tiruppur, of the sale proceeds to be dealt with by him according to law. The petitioning-creditor who applied under the

*A A O Nos. 22 and 23 of 1923. 27th August, 1924.

Ramanadhan Chettiar v. Subramania Chettiar. — Madhavan Nair, J.

insolvency law for the adjudication of the debtor as an insolvent and for the appointment of the *interim* Receiver resisted this application and the District Judge rejected it. This appeal is by the creditor against the order of the District Judge refusing to re-transfer to the District Munsif's Court of Tiruppur the sale proceeds of the 2nd respondent's properties now in the possession of the *interim* Receiver.

The principle of law to be applied to the decision of this appeal is embodied in S. 51 cl. (1) of the Provincial Insolvency Act which runs as follows :—" Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition." It has been argued by Mr. Krishnaswami Iyer that, according to this section, irrespective of the time of realisation, assets realised in the course of execution by a sale which has been held before the date of the admission of the insolvency petition are preserved for the benefit of the execution creditor or, in other words, if the sale by means of which the assets are realised is held before the date of the admission of the petition, then the assets, even if they be realised after the date of the admission of the petition, enure to the advantage of the execution creditor. Shortly stated, this argument makes the "date of the admission of the petition " qualify the " sale " and not " assets realised " in the section. The records in the case do not show the date of the admission of the petition ; but, for the purposes of this appeal, the date may be taken to be some time between the 1st and 4th July ; in any event, it cannot have been later than the 4th of July, when the *interim* Receiver was appointed. Since the execution sale in this case was held on the 27th of June, 1922, *i. e.*, anterior to the 4th of July, it follows from the argument just stated that the appellant-creditor is entitled to all the assets as against the *interim* Receiver. We cannot accept this argument. It seems to us that " the policy and object of the statute is to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active " *Bower* v. *Hett* (1). This object will obviously be frustrated if we accept the construction put upon the section by the learned Vakil for the appellant. We think

1. (1895) 2 Q. B. 51 at 56.

Ramanadhan Chettiar v. Subramania Chettiar.

Madhavan Nair, J.

that the words "date of the admission of the petition" occurring in this section qualify "assets realised"; so that only assets realised before the date of the admission of the petition will enure to the benefit of the execution-creditor. The question then arising for consideration is, were assets realised in the course of execution before the date of the admission of the petition in this case? The words "assets realised in the course of execution" have been interpreted in many decisions in cases which arose under S. 295 of the old Civil Procedure Code corresponding to S. 73 of the present Code. We think these may be usefully referred to for elucidating the meaning of the words "assets realised" occurring in this section. In *Hafez Mahomed Ali Khan* v. *Damodar Pramanick* (2) it was held that, when property is sold in execution of a decree, the sale proceeds may be said to be assets realised only when the balance of the purchase-money is paid and not when 25 per cent. is deposited in Court. In *Ramanathan Chettiar* v. *Subramania Sastrial* (3) occur the following observations by Sir Arnold White, C. J. :—"It seems to me that the word 'assets' in S. 295, Civil Procedure Code, means the proceeds of the sale of the property which is sold in execution of the decree. As far as the present case is concerned, I am of opinion that the assets were realised when the whole of the proceeds were paid into Court." Though there is no doubt a change in the corresponding provision of S. 73 of the present Code in that it substitutes the word "receipt" for the word "realised" in S. 295, still, so far as the question before us is concerned, the decisions under S. 73 are also helpful in arriving at a conclusion as to the meaning of the term "assets realised." In the case in *Arimuthu Chetti* v. *Vyapuri Pandaram* (4), where the purchaser made the deposit on the 17th September, 1909, and the balance of the purchase-money was paid into Court on the 29th September, 1909, it was stated by Abdur Rahim, J. "It must be taken, having regard to the decision in *Ramanathan Chettiar* v. *Subramania Sastrial* (3), that the assets were realised only on the 29th September, 1909, within the meaning of S. 295 of the old Code. There is no doubt a change in the corresponding provision of S. 73 of the present Code. But so far as the question before me is concerned, the change in the language is immaterial. The purchase-money becomes the asset of

2. (1891) I L R 18 C 242. 3. (1902) I L R 26 M 179 at 181,
4. (1910) I L R 35 M 588 : 21 M L J 505.

Ramanadhan Chettiar v. Subramania Chettiar.

Madhavan Nair, J.

the judgment-debtor only when the balance is received and not when the deposit is made." To the same effect is also the decision in *The Maharaja of Burdwan* v. *Apurba Krishna Roy* (5). Having regard to these decisions, we must hold that in this case the appellant is not entitled to claim either the balance of the purchase-money or the initial deposit of 25 per cent., as they cannot be considered to be "assets realised" in the course of execution by sale before the date of the admission of the insolvency petition within the meaning of S. 51 of the Provincial Insolvency Act. It follows, therefore, that the appellant's petition for a re-transfer of the sale proceeds to the District Munsif's Court of Tiruppur, was rightly rejected by the District Judge.

We dismiss this Civil Miscellaneous Appeal with costs.

In C. M. A. No. 23 *of* 1923 :—Following the decision in C. M. A. No. 22 of 1923, this Civil Miscellaneous Appeal is also dismissed. No costs.

A. V. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

N. Srinivasachariar *Petitioner** (*Petitioner*)

v.

Bhagavathapuram S. Venkatarama Aiyar *Respondent* (*Respondent*).

Srinivasachariar v. Venkatarama Aiyar.

Madras District Municipalities Act, 1920—*Rules* 1 *and* 7 (1)—*Candidate deemed to be duly elected under Rule* 7 (1)—*Validity of election of—Dispute as to —Decision of —District or Sub-Judge—Jurisdiction—R.* 1 —*Scope of.*

Under the rules framed by Government for the decision of disputes as to the validity of an election held under the Madras District Municipalities Act, 1920, the District or Subordinate Judge has no jurisdiction to decide a dispute when the number of candidates being less than the number of vacancies a candidate has been deemed to be duly elected under R. 7 (1) of the Rules for the conduct of elections

R. 1 must be limited in its scope to cases where a poll has been held.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam in O. P. No. 54 of 1923, dated 22nd July, 1924.

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5. (1911) 15 C W N 872.

*C. R. P. No. 524 of 1924. 16th September 1924.

Srinivasachariar v. Venkatarama Aiyar.

S. Srinivasa Aiyangar, K. Bhashyam Aiyangar and *K. Narasimha Aiyangar* for petitioner.

K. S. Jayarama Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The facts are fully set out in the order petitioned against. The petitioner was a candidate for election as Councillor in Kumbakonam Municipality when the Chairman received a letter, purporting to be from him but which he repudiates as forged, withdrawing his candidature. Accordingly the counter-petitioner was deemed to be elected, and the petitioner moved the Subordinate Judge under the Rules for the decision of disputes as to the validity of an election. The Subordinate Judge has held that he has no jurisdiction under these rules, and hence this Civil Revision Petition. The question for determination is whether under the rules framed by Government for the decision of disputes as to the validity of an election held under the Madras District Municipalities Act, 1920, the District or Subordinate Judge has jurisdiction to decide a dispute when the number of candidates being less than the number of vacancies, a candidate has been deemed to be duly elected under R. 7 (1) of the Rules for the conduct of elections.

Rule 1 of the rules for the decision of disputes runs :— "No election held under the Madras District Municipalities Act, whether of a Councillor, Chairman or Vice-Chairman, shall be called in question except by an election petition presented in accordance with these rules to the District or Subordinate Judge having jurisdiction by any candidate or elector against the candidate (hereinafter called the returned candidate) who has been declared by the Chairman to have been duly elected."

Rule 7 (1) of the rules for the conduct of elections runs :—"If the number of candidates who have been validly nominated and have not withdrawn their candidature is equal to the number of vacancies, all such candidates shall be deemed to be duly elected." These last words are tantamount to saying that an election shall be deemed to have been held, and so far, R. 1 for the decision of disputes presents no difficulty. An election has been held under the Act. But when the rule proceeds to confine the petition to one against the candidate (hereinafter called the returned candidate) who has been

Srinivasachariar v. Venkatarama Aiyar.

declared by the Chairman to have been duly elected, I think that its scope must be limited to cases where a poll has been held. Because when the candidates are deemed to be duly elected under R. 7 (1), there is no question of any declaration by the Chairman. In fact, in the present case, the petitioner has never alleged that he was declared by the Chairman to have been duly elected. It is only after a poll that the Chairman is directed [R. 23 (*a*)] to prepare a return in Form No. VIII and declares the election of the candidate to whom most votes have been given. If the wording in R. 1 had simply been "declared to have been duly elected," I should have been inclined to hold that the rule gave jurisdiction in cases where the candidate was deemed to be duly elected. For "declared" by itself means no more than published, and there would presumably be a publication of the result whenever a candidate was deemed to be elected. In this connection the rules for election to the Legislative Assembly may be compared. There, after a poll, a declaration of the result is to be made by the Returning Officer, but if there is no poll the result simply "shall be declared" and by whom is not stipulated. On the other hand, the rules for the conduct of municipal elections might have contained a specific direction that when the number of vacancies and of candidates was equal, the chairman should forthwith declare the candidates to be elected, and return their names. This would follow the English rule in S. 1 of the Ballot Act of 1872 and then there would clearly be jurisdiction under the rules for decision of disputes. But inasmuch as Government have omitted all reference to a declaration in cases where the number of vacancies and of candidates is equal and have fully provided for a declaration by the chairman in cases where there has been a poll, I think it may fairly be presumed that they intended a petition against the candidate who has been declared by the chairman to have been duly elected to be confined to cases where he has been elected by a poll. That this was the intention of Government is further borne out by the framing of Form VIII—the only Form supplied for the return of elected candidates, in which the reference to valid and invalid votes clearly shows that a poll is contemplated.

I therefore agree with the learned Subordinate Judge that has has no jurisdiction to inquire into disputes of this nature. The petitioner cites as authority in his support the ruling in *Sarvothama Rao* v. *Chairman, Municipal*

Srinivasachariar v. Venkatarama Aiyar.

Council, Saidapet (1). Two candidates whose nomination papers had been rejected applied for an injunction to restrain the candidate deemed, in consequence of his rejection, to have been duly elected from acting as councillors. Sir Walter Salis Schwabe, C. J., observed : " It is open to these candidates to proceed by election petitions." Wallace, J. also observes : "The petitioners have their remedy by way of election petitions.. .Elections have been held and there is a tribunal set up by the rules for the decision of petitions to set aside election." The peculiar difficulty which has been discussed in this case was evidently not present to the minds of the learned Judges, and until the point is specially raised, it is natural to assume *prima facie* that R. 1 applies to all cases of election. Therefore I do not hold that the ruling in *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet* (1) governs the case.

The petition is dismissed with costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Koduri Subbarayudu and others *Appellants* in S. A. (L. Rs. of Plaintiff in O. S. No.* 805 *of* 1917)

v.

Koyyalamudi Subbanna and another. .*Respondents in S. A. (Defendants Nos.* 2 *and* 3 *in O. S. Nos.* 780 *and* 781 *of* 1917 *and* 2 *and* 3 *in O. S. No.* 805 *of* 1917).

Subbarayudu v. Subbanna.

Negotiable Instruments Act, S. 29—Executor—Guardian—Pro-note by—Personal liability under—If and when excluded—Note for debt binding on estate or minor's estate if decisive—Hindu Law—Joint family property—Father—Will appointing guardian of property for minor son—Validity.

Executors are personally liable on promissory notes executed by them as such even though they may be acting for the benefit of the testator's estate in doing so unless their liability is excluded in the manner provided in S. 29 of the Negotiable Instruments Act.

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1. (1923) 45 M L J 23.

*S. A Nos. 998 to 1000 of 1921. 22nd February 1924.

Subbarayudu v. Subbanna.

A person does not exclude his own personal liability under a promissory note executed by him merely by saying that he executes the pro-note as a guardian.

Held, that under a promissory note executed by the executors under the will of a deceased Hindu, the executors had made themselves personally liable for the amount of the note, though it had been executed, not for money borrowed by the executors themselves, but for money already due by the testator.

Held, likewise that under a note executed by the guardians of a minor for a debt binding on the minor's estate, the guardians had made themselves personally liable.

A Hindu father cannot validly appoint by will a guardian of the property for his minor son to take effect after his death where such property is joint family property.

Second Appeals against the decrees of the Court of the Additional Subordinate Judge of Rajahmundry in Appeal Suits Nos. 3, 4 and 5 of 1920 preferred against the decrees of the Court of the Temporary District Munsif of Razole at Amalapuram in Original Suits Nos. 805, 781, and 780 of 1917 respectively.

P. Somasundaram for appellants.

S. Varadachariar and *B. Satyanarayana* for respondents.

The Court delivered the following

JUDGMENT :—These are three Second Appeals arising from three suits brought by three plaintiffs on promissory notes executed to them respectively by defendants 2 and 3. The cases being similar in their facts they have been dealt with in one judgment by the lower Courts and it will be convenient to do so in Second Appeal as well.

One Viranna died leaving debts due to these plaintiffs among others. The 1st defendant is his minor son and was his undivided co-parcener. The property belonging to Viranna is found to have been all joint family property. He nevertheless executed a will before his death and named defendants 2 and 3 as the executors of it ; he authorised them to take possession of the properties on behalf of his minor son and manage them and collect outstandings and pay the necessary education and maintenance expenses with his mother's consent and hand over the properties and accounts to the minor on his attaining majority. Defendants 2 and 3 entered upon the management under this will, though it is clear that the document is invalid in law as a will in so far as it purported to deal with the joint family property. Plaintiffs as creditors of Viranna pressed defendants 2 and 3 for the payment of their dues. Defend-

ants 2 and 3 asked them for time and executed the suit promissory notes themselves in renewal of promissory notes of the testator. In these suits plaintiffs claimed decrees against defendants 2 and 3 personally as the makers of the notes and against the estate of the 1st defendant. The District Munsif gave them a decree against defendants 2 and 3 personally and dismissed the suits against the minor's estate. Thereupon both the plaintiffs and defendants 2 and 3 appealed to the Subordinate Judge who gave decrees against the estate of the minor but dismissed the suit against defendants 2 and 3. The minor has not appealed, but plaintiffs have brought these Second Appeals claiming personal decrees against defendants 2 and 3.

The question for decision is whether defendants 2 and 3 are personally liable under the notes. It will be convenient now to refer to the promissory notes in the three cases, separately as there is some difference in their language. Taking S. A. No. 998 first the note Ex. A though it sets out in the preamble that it is executed by Subbanna and Satyanarayana (who are defendants 2 and 3) as executors of the will of Viranna, it says in the body of the note " On demand we promise to pay to you or to your order, etc. " and it is signed by defendants 2 and 3 without any qualification being added to their signatures. It seems to me clear on the language of the note that defendants have made themselves personally liable for the amount due. When a note is executed by any person he is personally liable on it unless it is clear that such a liability is excluded. The document no doubt speaks of the defendants as executors of Viranna's will. But the will being invalid they had really no such capacity but even if it is to be assumed that the defendants executed Ex. A only as the executors of Viranna's will. Plaintiffs are still entitled to a personal decree as executors are personally liable on notes executed by them as such even though they may be acting for the benefit of the testator's estate in doing so unless their liability is excluded in the manner provided in S. 29 of the Negotiable Instruments Act. It is clear law that an executor is personally liable. See *Chidambaram Pillai* v. *Veerappa Chettiar* (1), *Sudhir Chandra Das* v. *Gobinda Chandra Roy* (2) and *Ferhall* v. *Ferhall* (3). It was argued that as Ex. A was executed not

1. (1917) 22 M L T 380. 2. (1917) I L R 45 C 538.
3. (1871) 7 Ch. A. 123.

Subbarayudu v. Subbanna.

for money borrowed by the executors themselves but for money already due by the testator the liability fell only on the estate. Whether recourse can be had to the estate or not in those circumstances, a point I need not consider, the liability of the executant of the note, it seems to me, remains. The suit note was executed by the defendants in consideration of the plaintiffs forbearing to sue. In fact the correspondence shows that the defendants expressly asked for time and executed the note to get such time and they got it thereby. Most of the cases cited before me refer to the question how far recourse can be had to the estate on a note executed by an executor, or a guardian of a minor or a trustee of property. Such are the cases in *Krishna Chettiar* v. *Nagamani Ammal* (4), *Ammalu Ammal* v. *Namagiri Ammal* (5), *Venkatasami Naicker* v. *Muthusawmi Pillai* (6) and *Ramajogayya* v. *Jagannadhan* (7). When an executor executes a promissory note, to exclude his personal liability he must bring himself under the exclusion provided for in S. 29 of the Negotiable Instruments Act. Ex. A clearly does not comply with that provision. I must hold, therefore, that defendants 2 and 3 are personally liable. I need not consider whether in this view the decree against the estate is correct or not for no appeal has been filed for the minor against it. S. A. No. 998 must therefore be allowed and the decree of the Subordinate Judge modified by making defendants 2 and 3 also liable for the amount decreed and costs of the first Court. Defendants 2 and 3 will pay the costs of their appeal to the lower appellate Court and of this second appeal to the plaintiffs with the usual 6 per cent. interest on them.

Taking S. A. Nos. 999 and 1000 next, the language of the notes in these cases is different from the language of the note in S. A. No. 998. The notes in these cases begin by saying in the preamble that they are executed by the minor by the guardians appointed under Viranna's will but they are in fact both executed by defendants 2 and 3. The note in S. A. No. 999 is signed by them as guardians of the minor, whereas the note in S. A. No. 1000 is merely signed by them without any description added. Under both notes, however, the executants, defendants 2 and 3 themselves, promise to

4. (1915) I L R 39 M 915. 5. (1917) 33 M L J 631.
6. (1917) 34 M L J 177. 7. (1918) I L R 42 M 185 : 36 M L J 29 (F B).

Subbarayudu v. Subbanna.

pay the amount on demand. In Ex. E the note in S. A. No. 1000 the language is "*any one* of us shall be liable for and pay this sum of Rs. 2,240 to you or your order on demand." The other note says, "on demand *we* shall pay this sum of Rs. 2,240 to you or your order on demand." The other note says, "on demand *we* shall pay you or order, etc." It seems to me clear on the language of the notes that the executants were undertaking a personal liability to pay though they were acting guardians of the minor in executing them. They were not validly appointed as guardians, for it has been held in this Court that a Hindu father cannot validly appoint by will a guardian of the property for his minor son to take effect after his death where such property is joint family property as in this case. But it must be conceded that the parties were under the impression that the will was valid and defendants 2 and 3 did act as the *de facto* guardians of the minor. However that may be as they undertook to pay themselves they cannot now disclaim their personal liability. A person does not exclude his own personal liability merely by saying that he executes the pro-note as a guardian. In the case in *Krishna Chettiar* v. *Nagamani Ammal* (4) the question of the liability of the mother was not dealt with as pointed out by Wallis, C. J. in *Palaniappa Chettiar* v. *Shanmugham Chettiar* (8). The reason why the defendants undertook to pay is plain from Ex. F in S. A. No. 999 which shows that they wanted to avoid suits being filed and asked for time and "agreed to settle the affair according to the plaintiff's will and pleasure." They do not say or indicate in the notes that they will pay only from the estate of the minor, but, on the other hand, they say they will pay the note amounts. I need not consider in these cases either whether the decrees given against the estate are proper decrees, for the same reasons as given above in S. A. No. 998. These Second Appeals must also be allowed and the decrees of the Subordinate Judge modified in the same manner as in S. A. No. 998 with the same order as to costs.

A. S. V *Appeals allowed Decrees modified.*

4. (1915) I L R 39 M 915.

8. (1918) I L R 41 M 815 at 816 : 35 M L J 90.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE JACKSON.

M. Maruthavanaswami *alias* Sadasiva Desika Pandarasannadhi Avergal ... *Petitioner in both** (*Counter-petitioner*)

v.

Subramania Thambiran, calling himself Subramania Desika Pandara Sannadhi ... *Respondent in both* (*Petitioner*).

Marutha-vanaswami *v.* Subramania Thambiran.

Madras (*Administration of Estates*) *Regulation III of 1802, S. 16 cl. 7—Scope of—Duty of Court—More than one claimant to the estate of the deceased—Jurisdicion to decide on rival claims.*

Madras Regulation III of 1802 dealt with rules of Civil Procedure which were in force till a more elaborate system was devised and enacted in the form of the Code of Civil Procedure and the Civil Courts Act. All the sections have now been repealed except S. 16, cls. 2 to 7. Scope of the clauses considered.

When a person dies intestate leaving personal property, the duty of a Judge under S. 16 of the Regulation, if more than one claimant appears before him is to refer the parties to a regular suit. He has no jurisdiction to give any decision acting under this Regulation, when more than one claimant appears and claims property under S. 16, cl. 7.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Subordinate Judge of Mayavaram in O. P. No. 60 of 1923, dated 29th March, 1924, and in I. A. No. 197 of 1924 in O. P. No. 60 of 1923, dated 2nd May, 1924, respectively.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for petitioner.

T. R. Ramachandra Aiyar, S. Muthiah Mudaliar and *K. Narasimha Aiyangar* for respondent.

The Court delivered the following

JUDGMENT :—These revision petitions have been filed in respect of two orders of the Subordinate Judge of Mayavaram, dated 29th March, 1924 and 2nd May, 1924. The proceedings before him were under S. 16, cl. 7 of Madras Regulation III of 1802, and the learned Judge by his first order directed that affidavit evidence should be adduced and by his second order refused permission to the petitioner before us to cross-examine the deponents to the affidavits.

The facts are shortly these. The Pandara Sannadhi of Dharmapuram Mutt died on or about the 28th October, 1923.

*C R P Nos. 490 and 491 of 1924. 3rd September, 1924.

The Sub-Magistrate having jurisdiction over the locality, looked and sealed the rooms containing some moveables belonging to the Mutt and sent up a report to the Collector of Tanjore and he directed the Sub-Magistrate to hand over the keys of the rooms to the Subordinate Judge of Mayavaram, who was requested by the Collector to take proceedings under Regulation III of 1802. The present petitioner who is the Pandarasannadhi of Swargapuri Mutt put in a petition on the 5th November, 1923 stating that as the late Pandarasannadhi died without appointing a successor he as the head of a dependant Mutt was entitled to succeed. The respondent was a rival claimant who also filed a petition claiming that he was the rightful successor on the ground that he was elected Pandarasannadhi of the Dharmapuram Mutt by the Thambirans of that Mutt. The petition of the petitioner was O. P. No. 58 of 1923, and the petition of the respondent was O. P. No. 60 of 1923.

The learned Vakil for the petitioner has contended that his petition is in the nature of an original petition, and that the procedure applicable is that applicable to suits and that therefore he is entitled to ask that evidence should be taken *viva voce*. The arguments turned on the question to some extent, whether the proceeding was a regular petition or an interlocutory application, but on the view we take of the scope of the Regulation, we are of the opinion that these questions do not arise.

The Regulation in question deals with rules of Civil Procedure and contains also various other provisions. In the early part of 19th century, this measure was considered quite adequate, but, later on, a more elaborate system was devised and practically the whole Regulation has been repealed, its place being taken by the Code of Civil Procedure and the Civil Courts Act. Curiously enough, a few sections have been left unrepealed, although we are unable to discover any ground for the retention at any rate of a large portion of what has not been repealed.

Now, turning to the Regulation, we find that it contained 29 sections and that all of them have been repealed excepting S. 16, cls. 2 to 7. S. 2 referred to the filing of a complaint, that word being the equivalent of a plaint, and procedure was laid down in the succeeding sections in regard to trial of suits,

Marutha-vanaswami v. Subramania Thambiran.

S. 16, cl. 2, enacts that when a Hindu or a Mussalman dies leaving a will and appointing an executor, Courts of Justice are not to interfere except upon a regular complaint brought against his executors for a breach of trust or otherwise.

The third clause refers to the case of a Hindu or a Mussalman dying intestate but leaving an heir and the Courts are restricted from interference in such cases except upon a regular complaint. The fourth clause enacts that if there are more heirs than one to a person dying intestate and there is no disagreement, the Courts are not to interfere without a regular complaint. But, if there are disputes between the several claimants on a regular suit being filed by the party out of possession, the Judge is required to take security from the party in possession and if the latter is unable to give security, the Judge may give possession to the plaintiff himself on his giving security. But this act of the Judge is merely an act of administration for the benefit of the heir who may eventually succeed in the suit. Then follows the fifth clause. The first part of which is merely a continuation of the fourth clause. If neither party is able to give security, an Administrator is to be appointed for the management of the estate until the disposal of the suit.

Pausing here for a moment, we fail to see of what use these provisions are at the present day. Nobody would think of resorting to them because under the Civil Procedure Code parties can obtain interim orders in regard to protection of property which is the subject of a suit.

Now we come to part 2 of cl. (5). Where there is no person authorised and willing to take charge of the landed estate of a deceased person, the Judge is authorised to appoint an Administrator for its management, until the legal heir to the estate or other person entitled, shall attend and claim the same. If the Judge is satisfied that the claim is well-founded, the Administrator shall deliver over the property to him with an account of the Administration. This is the effect of cl. (5), part 2, but we have seen that when there are several claimants, the Regulation specially enacts in cls. 2, 3, 4, 5 and 7 that their rights are to be adjudicated on in a regular suit. But cl. 5, part 2 does not contemplate a suit and is it intended that under that clause if there are several claimants the Court is to give a decision although there is no suit ? It seems to us that this construction would be contrary to the scheme of the Regu-

lation. What is meant by part 2, cl. 5, seems to be that if there is a single claimant the Judge on being *prima facie* satisfied as to his title, is to direct the *interim* Administrator to transfer possession to him. It is not intended that if more than one claimant appears the rights of the several claimants are to be decided without a suit. Under cl. 4 and 1st part of cl. 5, if one of the rival claimants is in possession, the title to the estate can be decided only in a suit. But if neither party is in possession (2nd part of cl. 5 applies then) is there anything to suggest that the Court is to decide without there being a suit ?

We are not concerned with cl. 5, but with cl. 7. We have however construed the previous clause, because there can be no doubt that the same interpretation in this respect must be placed both upon cls. 5 and 7.

Clause 7 enacts, that the Judge on receiving information that any person had died intestate leaving personal property and there is no claimant to such property, shall adopt measures for its care and issue an advertisement "requiring the heir of the deceased or any person entitled to receive charge of his effects" to attend and should any person attend and satisfy the Judge as to his title to the property, the same is to be delivered up to him. Should no claim be preferred within 12 months, a report is to be transmitted to the Governor in Council. Cl. 5, part 2 refers to real property and clause 7 refers to personal property. But the scope of both the clauses seems more or less identical. In our opinion clause 7 (as clause 5, part 2 does) contemplates the case only of a single claimant and the words occurring in the clause such as "heir of the deceased" and "any person entitled" also to a certain extent confirm our view.

The duty of a Judge, if more than one claimant appears before him, is to refer the parties to a regular suit. He has no jurisdiction, in our opinion, to give any decision acting under this Regulation when more than one claimant appears and claims property under cl. 7 of S. 16.

As we have held that the Judge cannot decide the dispute at all, it is obvious we cannot direct him to take evidence *viva voce* or to permit the petitioner to cross-examine the deponents to the affidavits.

The Civil Revision Petitions therefore fail and are dismissed, but in the circumstances without costs.

T. S. V. *C. R. Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

The President, Taluk Board, Hospet. *Petitioner* (Counter-Petitioner)*

v.

Jutur Chandrappa *Respondent (Petitioner).*

President, Taluk Board, Hospet *v.* Jutur Chandrappa.

Madras Local Boards Act (XIV of 1920), S. 55 (2) (iv)—Disqualification for election—Honorary Magistrate—Resignation of office—If removes disqualification—Acceptance by Government necessary.

An Honorary Magistrate who is disqualified for election as a member of a Local Board under S. 55 (2) (*iv*) of the Madras Local Boards Act cannot relieve himself of that disqualification by merely submitting his resignation to Government. The disqualification subsists until the Government accepts the same. Payne, *Law of Elections,* p. 201 followed ; *Sudarsana Rao* v. *Christian Pillai,* 45 M L J 798 referred to.

Petition under S. 107 of the Government of India Act, praying the High Court to revise the order, dated 17th November, 1922, of the District Court of Bellary in O. P. No. 47 of 1922.

K. Rajah Aiyar for petitioner.

C. Sambasiva Rao for respondent.

The Court delivered the following

JUDGMENT :—Petition to revise the order of the District Court of Bellary on a reference made to him under S. 57 of Madras Act XIV of 1920. The point referred to by the Judge, which is the sole question for determination, is whether an Honorary Magistrate who is disqualified for election as a member of a Local Board under S. 55 (2) (*iv*) of the above Act, can relieve himself of that disqualification by submitting his resignation to Government, or whether, on the contrary, the disqualification subsists until Government have removed him from his office.

The point was also referred to the Local Self-Government Department by the President of the District Board, Bellary,and it replied in G. O. No. 1308, L and M. Mis., dated 1st August, 1922 "An Honorary Magistrate is disqualified for election or appointment as a member of a Local Board before his resignation is accepted by the Government." This order was filed before the District Judge who held that it was

*C R P No. 133 of 1923. 8th September, 1924.

President, Taluk Board, Hospet v. Jutur Chandrappa.

in literal conformity with the law, and there, it would be thought, the matter might have ended. But the learned Judge proceeding upon what he describes as the spirit of the law, apparently meaning the intention of the Legislature which it had failed to express in its statute, declared that a bare resignation is sufficient. A Judge has no dispensing power which allows him to go behind the plain import of a statute, and on this particular point the law is clear. Under S. 14 (1) of the Code of Criminal Procedure the Local Government may confer upon any person all or any of the powers conferrable on a Magistrate. Under S. 26 of the Code of Criminal Procedure all Magistrates may be removed from office by the Local Government. A person so appointed cannot remove himself by resignation. This is the doctrine of the English Common Law " After an office was conferred and assumed, it could not be laid down without the consent of the appointing power." (Payne's *Law of Elections,* 1890, page 201). English case-law is not of much assistance unless we know the exact terms on which the office sought to be renounced was held. But *Pease* v. *Lowden* (1) follows the above principle of Common Law. Two Scotch cases quoted in *Rogers on Elections,* Vol. II, p. 27, carry the matter no further, as shown in *Sudarsana Rao* v. *Christian Pillai* (2) where they are discussed. In this Madras case it is remarked, " It may be that the need for acceptance does not apply to honorary appointments. But it is unnecessary to pursue this line of argument further " page 799. I do not know what line of argument was then advanced. It is suggested before me that the appointment of an Honorary Magistrate is analogous to a contract without consideration, but pursued to its logical conclusion, this becomes absurd, for such an appointment would be void *ab initio.* I see no distinction in law between a Magistrate who receives and a Magistrate who does not receive a salary for the performance of his duties. Therefore the head note to *Sudarsana Rao* v. *Christian Pillai* (2) is correct, " An Honorary Magistrate does not cease to hold his office on his resignation, but only when the resignation is accepted," although that actual judgment contains *obiter* a query in the contrary sense.

The Civil Revision Petition is allowed with costs.

T. S. V. *C. R. Petition allowed.*

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1. (1898) 1 Q B D 386.

2. (1923) 45 M L J 798.

APPELLATE JURISDICTION.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

V. Lingayya Chetty ... *Appellant** (*Defendant*)

v.

Chengalammal *alias* Ammalu and others ... *Respondents* (*Plaintiffs*).

Lingayya Chetty *v.* Chengalammal.

Hindu Law—Adoption—Sudras of the Madras Presidency—Who may be adopted—Married person.

Among the Sudras of the Madras Presidency the adoption of a person who is married at the time of adoption is invalid. Case-law on the subject reviewed.

On appeal from the judgment and preliminary decree of the Honourable Mr. Justice Kumaraswami Sastri, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 186 of 1921.

V. Radhakrishnayya for appellant.

S. Rangaswami Aiyangar for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.* :—This is an appeal against a judgment of our brother Kumaraswami Sastri, J. He decreed the plaintiff's suit holding that the adoption of the first defendant was invalid on the ground that he had been married at the time of the adoption. Unless the appellant (1st defendant) successfully challenges this conclusion, the other points in the case do not arise. It is admitted that the parties are Sudras.

Apart from Sanskrit texts, the earliest opinion available in Madras is the case No. 18 of 1814 in Vol. 1 of the Select Decrees of the Sadr Adaulat, p. 101. The pundits' answer at p. 106 runs thus : "Sudras may be adopted till the sixteenth year. But as it is a rule that a married boy cannot be adopted it must be understood that an unmarried boy may be adopted till he has attained the age of sixteen. These are the rules for the Sudras caste. Thus it is declared in the Dutta Mimamsa, Dutta Chandrika and other Sastras." The point did not arise in the case.

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*O S Appeal No. 103 of 1922. 28th August, 1924.

Lingayya Chetty v. Chengalammal.

Ramesam, J.

The point was actually decided in another case in the same volume at p. 406 (*Venkatachella Reddiyar* v. *Moodoo Venkatachella Reddiyar*). The pundit stated that the adoption was invalid (p. 410) and the Court of Sadr Adaulat held (p. 412) that the adoption of the appellant after his marriage was "illegal and void under the rules and restrictions of Hindu Law."

We have next the statement of Sir T. Strange in his *Hindu Law* (Vol. 1, page 91): "Accordingly, in a case referred to in a subsequent page (p. 96, *case of Raja Nobkissen*) the pundits stated an assumption of the string in the higher classes and marriage in the fourth as obstacles to adoption." After referring to the possibility of annulment of ceremonies already performed in the natural family, he says, "upon these principles it would seem, as if there could be no adoption of one who is married; marriage not being capable, like tonsure and investiture, of annulment."

In the judgments of Sadr Court, 1861, at p. 147, *Vira Kumara Servai* v. *Gopalu Servai* (1) the same point arose and the District Munsif held the adoption to be illegal at the time thereof the plaintiff was a married man. Though the case went up on appeal and second appeal, the plaintiff did not challenge the District Munsif's ruling and in second appeal, the District Munsif's decision was restored.

In *Ayyavu Moopanar* v. *Niladatchi Ammal* (2) the plaintiff succeeded as adopted son on the ground that, in a previous litigation his adoption was recognized (rightly or wrongly) and he got a decree for maintenance against his adoptive father on the footing of a validly adopted son. The matter in the second litigation was *res judicata* between the plaintiff and his adoptive father. It appears that the pundits (in the first case) declared against its validity (p. 47) but the Registrar who gave the decree in appeal thought that the parties were of a class not strictly bound by the requirements of the Hindu Law. There was an appeal to the Privy Council but the matter was compromised and the appeal withdrawn. One of the terms of the compromise was that a daughter of the alleged adopted son should be married to a natural son of the adoptive father. In a later litigation, this marriage was attacked on the ground that it was invalid. The High Court in *Vythilinga* v. *Vijayathammal* (3) held that the adoption was

1. Sp. A. 3 of 1861 cited at p. 1066 of west and Buhler's *Hindu Law*, 3rd Ed,
2. (1862) 1 M H C R 45.
3. (1882) I L R 6 M 43.

Lingayya Chetty v. Chenga-lammal.

Ramesam, J.

invalid (the question of the validity of the adoption not being *res judicata*) and that the marriage was valid. Turner C. J., and Muthuswami Aiyar, J., said : "It would certainly be invalid under the Dattaka Chandrika, which declares that marriage concludes the period within which a Sudra may be adopted."

In *Pichuvayyan* v. *Subbayyan* (4) all the above authorities were reviewed and the adoption of a boy after his marriage was held to be invalid. It is true that the parties were not Sudras but the reasoning was general and applied to all Hindus. The respondent in it attempted to support the adoption by arguing from *Veeraraghava* v. *Ramalinga* (5) that, as the parties were of the same *gothra*, marriage is no obstacle. This argument was repelled. The Judge said : "There is no colour for the argument that this decision abrogated the *rule* according to which the previous marriage of the child is an obstacle to his adoption. There is, as we have shown, distinct authority for the rule and the recognition of it is in no way inconsistent with the decision regarding the ceremony of *Upanayanam*. It must be borne in mind that a valid adoption pre-supposes a gift by the father or mother, and they have no power under the Hindu Law to give the daughter-in-law or their son's wife in adoption." The learned Vakil for the respondent argues that, so far as the latter reason is concerned, the adoption of a childless widower would be valid. In the present case, the appellant was not a widower at the time of the adoption. In *Janakiram Pillai* v. *Venkiah Chetty* (6) the question was whether Gopalakrishna Pillai was validly adopted. The Court observed that there was no reliable evidence of an adoption before marriage and any adoption after marriage was invalid.

The authorities in Allahabad have been referred to by our learned brother and need not be repeated. The learned vakil for the appellant draws our attention to a quotation by Mahmud, J. in *Ganga Sahai* v. *Lekhraj Singh* (7) from Dr. Jolly who says "The Dattaka Tilaka does not consider marriage even as a bar to adoption, in case the person to be adopted belongs to the same *gotra* as the adopter. The Dattaka siddhan-tarnanjari declares that it is not lawful to adopt a married man." But the Dattaka Tilaka has never been

4. (1889) I L R 13 M 128. 5. (1885) I L R 9 M 148 (F B).
6. (1911) 10 M L T 21.
7. (1886) I L R 9 A 253 at 313.

used in Southern India. I doubt if its existence is known among the people and it does not appear that it has been followed in this respect in Allahabad or Bengal.

The most important argument of the vakil for the appellant is that most of the authorities against him are based on the Dattaka Chandrika and that the reasoning of the Dattaka Chandrika is not sound. There is no doubt as to the opinion of the author of the Dattaka Chandrika in ver. 29 of S. 11. It is true that the preceding reasoning from ver. 23 relates to the question whether the performance of tonsure operates as an obstacle. Mr. Sarkar in his *Hindu Law of Adoption* is of opinion that the conclusion of the Dattaka Chandrika rests on slender foundation. This may be so but we have to recognise the fact that, whatever its reasons may be, and whoever its author may be, the work was recognised as an authority in all the provinces outside Bombay. I need only refer to the latest decision of the Privy Council recognizing its authority, *Arumilli Perrazu* v. *Subbarayudu* (8).

Above all, it must be recognised that the rule has been acted upon for more than a century and it is too late to question it. The opposite rule in Bombay is based on the special authority of the Mayuka and cannot help us.

The decision of the learned Judge is right and the appeal is dismissed with costs.

The Receiver will be allowed to make his costs from the estate in the first instance.

Reilly, J.

Reilly, J. :—I agree. It has been contended before us for appellant that the passages of the Dattaka Chandrika on which is based, so far as that work is concerned, the doctrine that a married Sudra cannot be adopted have been misunderstood. But at the least it cannot be denied that it is possible to interpret terms (verses 29 and 32) of S. 11 of the Dattaka Chandrika taken together as stated by implication that in the author's opinion the adoption of a married Sudra is not permissible. That interpretation, it appears, has been accepted and acted upon in this Presidency for more than a century; and there does not appear to us any reported case in which it has been decided finally that the adoption of a married Sudra is possible. That being so, I do not think that we are at liberty to re-open the question.

T. S. V. *Appeal dismissed.*

8. (1921) I L R 44 M 656 at 664 : 41 M L J 33 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

*PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE JACKSON.

The Right Hon'ble the Secretary of State for India in Council, represented by the Collector of Chingleput ... *Appellant in all** (*Defendant in all*)

v.

V. K. Ramanujachariar and others... *Respondents* (*Plffs.*).

Secretary of State for India *v.* Ramanuja chariar.

Revenue Settlement—Lands assessed as dry—Rates if can be altered during period of settlement—Levy of enhanced rate—Suit against Government—If lies —Revenue Recovery Act, S. 58—If a bar.

Once a settlement is duly notified by Government, the Collector acting under the orders of the Board of Revenue cannot vary the rates of assessment. The annual payment fixed is incapable of being increased during the period for which the settlement is made. *Prasad Row* v. *The Secretary of State for India*, I L R 40 Mad. 886 at 897 followed.

Where lands assessed as dry at a Revenue Settlement are, within the period of 30 years for which the Settlement is to remain in force, re-assessed as wet and an enhanced rate is levied, the re-assessment is illegal and *ultra vires* and the assessee is not debarred by S. 58, Revenue Recovery Act, from filing a suit to have the enhancement declared illegal and for the recovery of the excess amount levied.

As the Government may be trusted to see that justice is done in accordance with decrees of Court, in such cases no permanent injunction need be passed against the Government restraining them from levying enhanced rate.

Second Appeals against the decrees of the District Court of Chingleput in A. S. Nos. 396 to 401 of 1919, preferred against the decrees of the Court of the District Munsif of Poonamallee in O. S. Nos. 468 to 470 and 503 to 505 of 1918 respectively.

The Advocate-General and *K. Jagannatha Aiyar* for appellant.

A. Krishnaswami Aiyar, K. Gopalaratnam and *P. Narasimhachariar* for respondents.

The Court delivered the following

Jackson, J.

JUDGMENTS :—*Jackson, J.*:—*S. A. No.* 1352 *of* 1921 :— Appeal from the decree in A. S. No. 396 of 1919 on the file of the District Court of Chingleput (O. S. No. 468 of 1918 on the file of the Court of the District Munsif of Poonamallee).

The plaintiff is a ryot holding certain lands which at the last Revenue Settlement in Chingleput District were assessed

*S A Nos. 1352 to 1357 of 1921. 27th August, 1924.

as dry. Since then, the assessment has been enhanced under orders of the Board of Revenue and the plaintiff has brought this suit against the Secretary of State for India for a declaration that such enhancement is illegal, for the recovery of the amount so levied, and for a permanent injunction restraining the defendant from levying such enhanced rates in future. The original Court and first Court of Appeal have decreed the suit as prayed for by the plaintiff and the defendant brings this Second Appeal.

The lands in question are of the sort described as "*Achukattu.*" They are surrounded by high bunds which in the wet season retain sufficient water for raising a paddy crop. At the settlement in 1909, the bulk of these lands was classified as "*Manavari*" or "rain fed" and charged rather more than ordinary dry, and less than ordinary wet. But certain numbers lying within the catchment area of tanks were held to be objectionable as interfering with the supply of water, and they were still classed as ordinary dry. Had they too been transferred to "*Manavari,*" Government would practically have conceded the claim of these lands to enjoy additional water facilities, when that claim was held to be objectionable. The Government Order No. 2240 (Revenue), dated the 14th August, 1909 (page 36 of the printed documents) lays down that those which lie so close to the foreshore of a Government tank as materially to interfere with its supply should be entered in a special list and left to be dealt with by the Collector in accordance with this existing district practice as embodied in G. O. No. 573 (Revenue), dated 24th June, 1905. In this G. O. (page 17 of the printed documents) the procedure enjoined is that water-rate should be charged if the *Achukattu* intercepts water which would otherwise flow into a Government irrigation work. Accordingly in the settlement notification, dated 1st June, 1910, Ex. A (at page 45 of the printed documents) it is declared that *Achukattus* which materially interfere with the supply of a Government irrigation work will be retained as ordinary dry, and will be dealt with by the Collector in accordance with the practice obtaining in the District.

The Collector proceeded to levy water-rate upon these lands and several appeals were preferred to the Board of Revenue. The Board acting under confidential instructions from Government ruled that such water-rate was not leviable under the Irrigation Cess Act, but the lands concerned were

Secretary of State for India v. Ramanujachariar.

Jackson, J.

in accordance with the orders of Government liable to enhanced assessment. An appropriate enhancement would be the difference between the wet and dry rates. "The water-rates levied will be refunded but an enhanced assessment will be charged for the wet *'Achukattu'* cultivation and this should be the corresponding wet assessment *minus* the dry assessment already levied "—Ex. I (page 49 of the printed documents). In conformity with this resolution the Collector enhanced the rates on the plaintiff's lands as set forth in para. 7 of the plaint.

The point for determination is whether such enhancement is legal.

The defendant contends that the provision in the notification, Ex. A, " will be dealt with by the Collector in accordance with the practice obtaining in the District " allows a large discretion. The practice, no doubt, was to charge water-rate if a paddy crop was raised ; but since such charges are not rightly leviable under the Irrigation Cess Act, an enhanced assessment practically amounts to the same thing, and can be described as " in accordance with the practice obtaining in the District. " The short answer is that such practice never did obtain nor could obtain. Once a settlement has been duly notified by Government, the Collector acting under the orders of the Board of Revenue cannot vary the rates of assessment. The defendant relies upon para. 36 of the notification, Ex. A.

The thirty years' limit does not apply to lands the irrigation of which may be improved by Government subsequent to the settlement nor to lands which may be converted from dry to wet or *"Manavari"* conversion here of course refers to physical conversion. It does not mean that Government reserve to themselves the right at any time to convert the classification of a land as dry to one of wet. If that were so, there would have been no settlement.

It is claimed, however, apart from the notification that Government are at liberty to revise any assessment within the settlement period of 30 years (4th Ground of Appeal, *etc.*). But in the light of the Privy Council ruling in *Prasad Row* v. *The Secretary of State for India* (1), this claim was not seriously pressed in argument. The Judicial Committee rules that " the annual payment is incapable of increase during the period for which the settlement is made" (page 897).

1. (1917) I L R 40 M 886 : 33 M L J 144 (P C).

Secretary of State for India v. Ramanujachariar.

Jackson, J.

It is useless to say for all practical purposes the enhanced assessment is the same as the water rate or to urge that of the settlement is allowed to stand unrevised and unobjectionable. "*Achukattus*" classed as "*Manavari*" will actually pay a heavier assessment than objectionable *Achukattus* which are classed as dry. An executive act may be based on logic and common sense and yet be none the less illegal. The finding of the lower Courts must be upheld that when once these lands have been assessed as dry at the Revenue Settlement, they cannot within the period of 30 years during which that settlement remains in force be re-assessed as wet. Such assessment being illegal and *ultra vires*, the plaintiff is not debarred from bringing this suit by the provision of S. 58 of the Revenue Recovery Act.

The appellant further complains that no decree should have been issued in regard to the collections for Fasli 1326 for which no notice was given and no injunction should have been granted. In cases of this sort, Government does not resort to technicalities and may be trusted to see that justice is done in regard both to Fasli 1326 and to subsequent faslis. There is no necessity, therefore, to modify the decree of the lower appellate Court as regards Fasli 1326, nor any need to grant an injunction. The decree, therefore, will contain no injunction and is otherwise confirmed. The appeal in the main fails. Appellant will pay costs of the respondent in this appeal.

The other Second Appeals Nos. 1353 to 1357 of 1921 follow with costs to respondents.

Devadoss, J. :—I agree.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Nallagatti Goundan *Appellant** (*Petitioner-debtor*)

v.

Ramana Goundan and others. *Respondents* (*Respondents-creditors*).

Nallagatti Goundan v. Ramana Goundan.

Provincial Insolvency Act, S. 5—Interim protection to person who has applied to be adjudicated insolvent—Grant of—District Judge—Power of—Order declining to grant protection—Interference with, in appeal—Conditions.

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*A. A. O No. 64 of 1924. 18th August, 1924.

Nallagatti Goundan v. Ramana Goundan.

Under S. 5 of the Provincial Insolvency Act, the District Judge has inherent power to grant *ad interim* protection to a person who has applied for being adjudicated an insolvent.

Where, in the exercise of his discretion, the District Judge has declined to grant interim protection, the High Court will not interfere with his discretion unless it has been wrongly exercised.

Appeal against the order, dated 2nd October, 1923 of the District Court of Coimbatore in I. A. No. 320 of 1923 in I. P. No. 99 of 1923.

Vattrap S. Subramania Aiyar for appellant.

Dr. T. C. K. Kurup for respondents.

The Court delivered the following

JUDGMENT :—The appellant who had filed an application for adjudication as an insolvent applied for interim protection and this application was rejected by the District Judge. This appeal is against that order refusing such protection. In our opinion, the District Judge has inherent powers under S. 5 of the Provincial Insolvency Act to grant the appellant the protection he has claimed. [See *Abdul Razak* v. *Basir-ud-din Ahmed* (1)]. On the merits of the application we are not satisfied that the discretion vested in the District Judge has been wrongly exercised by him. In these circumstances we dismiss this Miscellaneous Appeal with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice*, AND MR. JUSTICE SRINIVASA AIYANGAR.

Sree Raja Rao Venkata Kumara Mahipathi Surya Rao Bahadur Garu, Rajah of Pithapuram *Appellant* (Plaintiff)*

v.

The Secretary of State for India in Council represented by the Collector of Godavari *Respondent (Defendant).*

Surya Rao Bahadur Garu, Rajah of Pithapuram v. Secretary of State for India.

Zamindari—Lands in, dedicated as cattle-paths prior to Permanent Settlement—Declaration of Zamindar's right to—Suit for—Villagers using lands as cattle-paths if necessary parties to—Maintainability of suit against Government —Conditions—Onus of proof on Zamindar—Land Encroachment Act of 1905—

1. (1910) 14 C W N 586.

*Appeal No. 311 of 1921. 27th August, 1924.

Surya Rao Bahadur Garu, Rajah of Pithapuram v. Secretary of State for India.

Penal assessment—Levy of, from occupants of lands let in by Zamindar—If affords cause of action to Zamindar—S. 7 of Act—Preliminary notice under—If affords cause of action—Regulation XXV of 1802, S. 4—Lakhiraj *lands—Public roads if.*

The plaintiff, claiming to be the Zamindar of a village included in his estate, sued the Secretary of State for India in Council for a declaration of ownership and for recovery of possession and for injunction in respect of certain *puntas* or lands used as cattle-paths in that village.

The plaintiff's case was that the suit *puntas* were dedicated for public use by the plaintiff's predecessors, that subsequently about the year 1883 the plaintiff's predecessors unlawfully entered upon the *puntas* and diverting them from their use as highways, let them to agricultural tenants, and doing so for over the statutory period succeeded in reducing them to their own private ownership; that in 1914, after the plaintiff had acquired an absolute title in respect of the suit lands, the Government took proceedings under the Land Encroachment Act, III of 1905, against the tenants in occupation let in by the plaintiff, and that, as the lands did not belong to the Government, their action under the Act was *ultra vires.* No members of the village community that used the suit paths in exercise of their communal rights were made parties to the suit.

It was found that the suit lands had been used as *puntas* even before the Permanent Settlement; that the lands had not been dedicated as highways by plaintiff's predecessors in interest, as alleged by the plaintiff; that the plaintiff had failed to prove that the right which the public got by dedication of the *puntas* for use as a means of communication had ceased owing to disuse, or otherwise; and that the plaintiff had not acquired any prescriptive right over them.

Held, that the suit was rightly dismissed by the Court below.

Per Officiating Chief Justice :—The fact that assessment was levied under the Land Encroachment Act from the occupants of the suit lands would not give the plaintiff a right of action against the Government. Further, as the suit was not brought within six months from that date, it was barred under S. 14 of that Act. A preliminary notice served on the plaintiff under S. 7 of the Act did not give rise to a cause of action.

The right of the public to the enjoyment of the whole width of land which has been set apart from time immemorial for use as a public way stands upon a higher footing than a mere easement over property belonging to another.

Per Srinivasa Aiyangar, J. :—The plaintiff in effect seeks a declaration that by adverse possession he has become the private owner of the suit lands. No such declaration can be made, as the members of the village against whom plaintiff's possession was alleged to have become adverse, have not been made parties to the suit.

The suit lands are not "*lakhiraj* lands" within the meaning of S. 4 of Regulation XXV of 1802.

Appeal against the decree of the Court of the Additional Subordinate Judge of Rajahmundry, dated 12th July, 1921 in O. S. No. 12 of 1920 (O. S. No. 1 of 1919, Temporary Sub-Court, Rajahmundry).

Surya Rao Bahadur Garu, Rajah of Pithapuram v. Secretary of State for India.

Spencer, Offg. C. J.

A. Krishnaswami Aiyar for appellant.

The Government Pleader for respondent.

The Court delivered the following

JUDGMENTS :—*The Officiating Chief Justice*:—The plaintiff is the Rajah of Pittapur. The defendant is the Collector of Godavari representing the Government. The subject of this suit are certain *puntas* used as paths by men and cattle in the village of Mummidivarappadu which forms part of the Palivela Estate acquired by purchase and testamentary disposition by the plaintiff's predecessors. No members of the village community that use these paths in exercise of their communal rights have been made parties to the suit. The inclusion of the Government as a party can only be justified on one of three theories—(1) that the pathways were excluded from the permanent settlement and belong to the Government, (2) that the Government is the custodian of the communal rights of the public in respect of these paths, vide *Venkatarama Sivan* v. *Secretary of State for India* (1) and (3) that the Government has unauthorisedly levied penal assessment under Act III of 1905.

The plaintiff (appellant) does not admit the first theory as it would be fatal to his suit to obtain a declaration of title.

As regards the third theory, the assessment was levied from the occupants in 1914 according to the allegation in the plaint. This circumstance will not give a right of action to the plaintiff who did not pay anything. Moreover the limitation period for persons aggrieved by proceedings taken under that Act is six months under S. 14 and that period was long past when this suit was filed in 1918. It came out in the evidence that the plaintiff's Dewan had been served with a preliminary notice under S. 7 to show cause why he should not be made to pay prohibitory assessment under S. 5 or be summarily evicted under S. 6, but it has been held in *Secretary of State* v. *Assan* (2) by a Full Bench that notices under S. 7 do not give rise to a cause of action.

It remains to be considered whether a declaration of title can be given to the plaintiff and an injunction issued restraining the Government from interfering in any manner with his possession and enjoyment. The plaintiff admitted in his plaint that the suit *puntas* were once dedicated to the use of the public

1. (1918) 36 M L J 203. 2. (1915) I L R 39 M 727 : 30 M L J 255 (F B).

Surya Rao Bahadur Garu, Rajah of Pithapuram v. Secretary of State for India.

Spencer, Offg. C. J.

as a highway. The letting out by him of the soil for cultivation must necessarily interfere with the use of the surface for a public highway. He has failed to prove that the right which the public got by dedication of these *puntas* for use as a means of communication has ceased owing to disuse, or otherwise. The Subordinate Judge has found on issue 2 that the plaintiff has not acquired any prescriptive right over them and we have been shown no reason to come to a different conclusion.

In the course of the arguments on the appeal, the appellant's Vakil admitted that he did not dispute the right of way of the villagers over the paths. He styled it an easement right, but the right of the public to the enjoyment of the whole width of land which has been set apart from time immemorial for use as a public way stands upon a higher footing than a mere easement over property belonging to another.

At any rate whatever right the public admittedly had in these paths has not been shown to have been lost, and therefore the plaintiff's appeal, like his ill-conceived suit, must fail and be dismissed with costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—The plaintiff (appellant) is the Rajah of Pittapuram. The defendant (respondent) is the Secretary of State for India in Council represented by the District Collector of Godavari. The plaintiff, claiming to be the Zamindar of a village called Mummidivarappadu included in the estate of Palivela, filed the suit for a declaration of ownership and for the recovery of possession and for injunction in respect of certain *puntas* as they are called or lands used as cattle-paths in that village. The Subordinate Judge who tried the suit dismissed it with costs. And hence this appeal.

The plaintiff states that the village in question was acquired by his father under the will of his paternal aunt. I may remark to begin with that the case has been conducted in a very strange manner on both sides in the Court below. The plaintiff has not produced a scrap of paper either the sanad in respect of the suit village or any other title deed in respect thereof, nor has any such document been produced on the side of the Government for the defence. But both sides have gone to trial on the assumption that the suit village belongs to the plaintiff and was a Zamin village in respect whereof a sanad in the ordinary form was, or must have been, issued in the early part of the last century. The plaintiff's case is briefly this : These *puntas* or cattle-paths were dedicated for public use by

the plaintiff's predecessors. Subsequently about the year 1883 the plaintiff's predecessors unlawfully entered upon these *puntas* and diverting them from their use as highways let them to agricultural tenants, and doing so for over the statutory period succeeded in reducing them to their own private ownership. It is alleged that in the year 1914 after the plaintiff had acquired an absolute right in respect of the suit land the Government took proceedings under the Land Encroachment Act, III of 1905, against the tenants in occupation let in by the plaintiff, and that as the lands did not belong to the Government their action under the Act was *ultra vires*. The plaintiff in these circumstances prays for a declaration that he is the owner of the *puntas*, and for such possession of the lands as may be necessary, and for an injunction against the defendant from interfering in any manner with the possession and enjoyment of the *puntas* by the plaintiff. It is clear from the Bhooband accounts relating to faslis even prior to the Permanent Settlement that the suit lands were used as *puntas* or cattle-paths even then. The plaintiff has in his plaint set up an affirmative case of dedication of these lands as highways by his predecessors in interest. That case has not been made out in the least. It is remarkable that the time when or about which such dedication was made is not mentioned in the plaint or made out in the case. The evidence in the case does not help us to determine whether the Zamin was, by the sanad granted by the Government, merely confirmed to the predecessor in interest of the plaintiff or was really in the nature of a fresh grant. In the present state of the record we are only left to speculation as to what really happened. However that may be, it is clear that the plaintiff has not made out the case set up by him of a dedication by his predecessors of the suit lands as *puntas* or highways, because an act of dedication might imply a capacity to dedicate and involve ownership. All that is therefore clear is that in or about the year 1802, when the Permanent Settlement was made, the suit lands were *puntas*. The plaintiff's alternative case, as we must take it to be, is, that at the Permanent Settlement, when the Zamindari was granted to his predecessor in interest, these *puntas* were also included in the grant by the Government. It is true that these *punta* lands are within the ambit of the Zamindari and would have passed to the Zamindar undoubtedly under the grant if not reserved by the Government and if there was not anything in

Surya Rao Bahadur Garu, Rajah of Pithapuram v Secretary of State for India.

Srinivasa Aiyangar, J.

the nature of the lands themselves by which they became excluded from the grant. It has been strenuously argued on behalf of the Secretary of State by the learned Government Pleader that these lands should be held to be *lakhiraj* lands within the meaning of S. 4 of Regulation XXV of 1802. The lower Court has found against this contention. I think the lower Court was right. The true meaning of *lakhiraj* lands would appear to be lands capable of being a source of revenue but granted away free of revenue or on favourable rent. The learned Government Pleader pressed on us that, according to the true construction of the words in S. 4 of the said Regulation, public roads should be included in the expression "lands exempt from public revenue." The expression "exempt from public revenue" would in the cricumstance itself seem to imply the possibility of the lands yielding revenue but for the exemption. I am, therefore, of opinion that the contention that these lands should be held to be *lakhiraj* lands cannot be supported. As the plaintiff has not proved that the grant to his predecessor was only in the nature of confirmation, we must take it that it was really in the nature of an original grant. The position was then this So far as these *puntas* were concerned, having been dedicated to the public as highways, the Government at the time of the grant held them in trust for the community, and it must be an unwarranted assumption to suppose that in violation of such trust the Government granted them away to the plaintiff's predecessor. I am not prepared to make any such assumption in favour of the plaintiff. This is against all principle. One of two things therefore must have happened, either the Government did not include these *puntas* in the grant because they were roads and lands intended not for agricultural purposes but only for general communal purposes, or else they made over the trust to the Zamindar for the purpose of maintaining the trust in favour of the community. If there had been no grant at all to the plaintiff's predecessor, it follows that the plaintiff's suit is not maintainable. If, on the other hand, the plaintiff's predecessor became a trustee in respect of the suit lands for the purposes of their being maintained as highways for the benefit of the public, it is inconceivable how a trustee could by adverse possession have reduced the trust property to private ownership. The learned Subordinate Judge has found that the plaintiff has not established the title by adverse possession against the Government and

Surya Rao Bahadur Garu, Rajah of Pithapuram v. Secretary of State for India.

Srinivasa Aiyangar, J.

we agree with him. The fact appears to have been that prompted by avidity the predecessors of the present plaintiff taking advantage of their power and influence as Zamindars and the helplessness of the ryots entered upon these public paths and let them to tenants in order to make money. Even assuming that the plaintiff was in law in a position to acquire by adverse possession a title to these lands, I am far from satisfied that the evidence on the record shows any such continuous adverse possession of all the lands in question for such period as would enable the plaintiff to acquire such title. Though prayers regarding possession and injunction are included in the plaint, I cannot but regard the suit in the main as a declaratory suit. The plaintiff seeks a declaration that by adverse possession he has become the private owner of these lands. Apart from the Government represented by the defendant the parties against whom the plaintiff's possession should have been adverse for the purpose of enabling him to acquire such title by prescription are the body of the villagers. They are not parties to this suit, and I fail to see how any such declaration could be made in a suit to which they are not parties. It has been argued by the learned Government Pleader, that, under S. 49 of the Local Boards Act, these *puntas* became vested in the Local Boards and that, under the provisions of S. 2 (2) of Act III of 1905, properties vested in the Local Boards are deemed to be properties of the Government for the purposes of the said latter Act. There are difficulties in the way of accepting this contention. It is true that all public roads have been vested by the said S. 49 in the District Board. But that section speaks of the vesting only of public roads and not of all roads and the expression "public roads" is defined in S. 3 (XXIII) of Act V of 1884 as a road already vested in some local body. There is no evidence whatever on which it may be held that these *puntas* were ever vested in any local body. The applicability of the sections of the Land Encroachment Act depending as it does on the vesting of the lands as public roads in the District Boards under the provisions of S. 49 of the Act, the right of the Government to take proceedings under the Land Encroachment Act is by no means clear. However that may be, the plaintiff not having shown that he is or has become the absolute owner of the suit lands, I must take it that the very basis of his suit fails and the dismissal of the suit by the lower Court was right. It has been suggested

Surya Rao Bahadur Garu, Rajah of Pithapuram v. Secretary of State for India.

Srinivasa Aiyangar, J.

in the course of the argument by the learned Vakil for the appellant that a declaration might be made in favour of the plaintiff at any rate with regard to the sub-soil of these lands leaving it open whether or not the right of highway still continues in the body of the villagers. No question has ever arisen with regard to the sub-soil of these lands in connection with any of the transactions or proceedings that led to this suit. To the plaintiff, who merely required to be able to let the surface soil to his own tenants for the purpose of making money, the right he was interested in securing and having declared was the right only to the surface soil. I cannot therefore regard except with suspicion a request by the appellant's Vakil that at any rate the right to the sub-soil should be declared in this action. Even if I should be inclined to do so, for the reasons already set out, I cannot say that he has sufficiently established his right to the sub-soil so as to entitle him to any such declaration.

The plaintiff's suit was therefore rightly dismissed.

The appeal fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice,* AND MR. JUSTICE SRINIVASA AIYANGAR.

P. Kanakasabapathy Mudaliar *Appellant* (Plaintiff)*

v.

Hajee Oosman Sahib and others. *Respondents (Defdts.).*

Kanakasabapathy Mudaliar v. Hajee Oosman Sahib.

Cause of action—Bonus to employee—Promise to pay—Suit to enforce—Maintainability—Transfer of ownership in bonus to employee by employer—Suit to recover bonus in case of—Maintainability.

In a suit which was dismissed upon a demurrer on the ground that the plaint disclosed no cause of action, the allegations in the plaint were that the plaintiff, a godown-keeper in the employment of a Mahomedan firm, was credited with a bonus of Rs. 3,500 out of the profits of the firm in consideration of the good services rendered by him and of the fine profits made by the firm, that bonus was carried to plaintiff's credit in the firm's books in 1919, and that in 1920 he was allowed to draw out of it Rs. 420 but that the defendants refused, in spite of his demand, to pay the balance.

Held by the Officiating Chief Justice :—The allegation in the plaint disclosed a case of a completed gift and a transfer of ownership in favour of the plaintiff ; if ownership in the bonus was completely transferred, and there was

*O. S. Appeal No. 87 of 1922. 27th August, 1924.

Kanakasabapathy Mudaliar v. Hajee Oosman Sahib.

more than a mere promise without consideration to give the plaintiff a bonus; it was immaterial that the amount was originally of the nature of a bonus; and the suit was wrongly dismissed on the ground that the plaint disclosed no cause of action.

Held by Srinivasa Aiyangar, J. (Concurring) :—The plaintiff's claim should be deemed to be based on a contract, apart from any question whatever of a contemplated gift, or a completed gift, and apart from any relationship between the parties of depositor and depositee, or creditor and debtor, and the plaintiff had a case on the footing of a contract which was clearly sustainable.

On Appeal from the Judgment of the Hon'ble Mr. Justice Coutts-Trotter, dated 2nd August, 1922, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court and made in C. S. No. 917 of 1920.

C. S. Nageswara Aiyar for appellant.

K. Narasimha Aiyar, P. C. Sundaram and *R. Purushothama Aiyangar* for respondents.

The Court delivered the following

Spencer, Offg. C. J.

JUDGMENTS :—*The Officiating Chief Justice* :—This suit was dismissed upon a demurrer, as the learned Judge was of opinion that the plaint disclosed no cause of action. No evidence was taken on either side. From the allegations in the plaint it appears that the plaintiff, a godown-keeper in the employment of a Mahomedan firm, styled Messrs. Oosman Hassan & Co., was credited with a bonus of Rs. 3,500 out of the profits of the firm in consideration of the good services rendered by him and of the fine profits made by the firm. The plaintiff alleged that this bonus was carried to his credit in the firm's books in 1919 and that in 1920 he was allowed to draw out of it Rs. 420, but that the defendants refused, in spite of his demand, to pay the balance.

The question of law is whether on the facts alleged the entry in the firm's books constituted a completed gift, and whether the defendants were trustees or depositees as regards the undisbursed amount of the bonus. S. 5 of the Indian Trusts Act says "No trust in relation to moveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust and registered, or by the will of the author of the trust . . . . or unless the ownership of the property is transferred to the trustee." S. 123 of the Transfer of Property Act declares that "for the purpose of making a gift of immoveable property, the transfer may be effected either by a registered instrument signed or by delivery."

Kanakasabapathy Mudaliar v. Hajee Oosman Sahib.

Spencer, Offg. C. J

The defendants' liability therefore turns on the question whether there was any delivery or transfer of ownership to the plaintiff.

A number of cases have been cited before us. The nearest to the facts of the present case appears to be *Bai Mahakore v. Bai Mangla* (1). In that case there was a credit entry made by Damodardas in his account books in the name of Harkore, his wife. Chandavarkar J., held that this constituted a valid trust in favour of Harkore. Heaton, J. held that Damodardas became a depositee and that the addition of interest to the deposit account and the debiting of money spent on pilgrimage was a further indication of the relations of the parties being those of depositor and depositee. In *Sabjan Sahib v. Abdul Azeez Sahib* (2) Abdur Rahim J., held that a mere entry in books of account did not create a completed gift on the facts of that case, and he attached much importance to the fact that Sabjan in whose name the credit stood did not draw upon the amount standing at his credit. The present case may be distinguished by the fact that there was a drawing upon the fund. In *Sir Jamsetji Jijibhai and others v. Sonabai* (3) Couch J., considered all the circumstances of the case as to whether there was an intention on the part of Sir Jamsetji Jijibhai to create a trust in favour of Sorabji Pestanji and, as indicating that intention, he had regard to the manner in which the money was dealt with, which was placed on the credit side of the account. He held in that case that a trust was created because there was no instance in which a sum of money had been placed on the credit side of the account in which the donor afterwards attempted to deal with the money as his own. In *Natha Gulab and Co. v. Shaller and G. I. P. Ry.* (4) a cheque was issued and attached before it was cashed and before the remittance was made by the Bank to the payee. Similarly in *Janki Das v. The East Indian Railway Company* (5) before actual delivery took place the bonus recommended to an employee of the Railway was attached in execution of a decree obtained against him. In the present case, there is not only the allegation that the amount of Rs. 3,500 was credited to the plaintiff in the firm's account, but there is further the allegation that he was allowed to operate upon this account. If the

1. (1911) I L R 35 B 403. 2. (1916) 42 I C 684 at 689.
3. (1865) 2 Bom. H C R 139. 4. (1923) 25 Bom. L R 599.
5. (1884) I L R 6 A 634.

Kanakasabapathy Mudaliar v. Hajee Oosman Sahib.

Spencer, Offg. C. J.

firm had paid out the bonus into the hands of the plaintiff and if the next moment he had deposited it for safe keeping with his employers, the position would have been in no way different from that disclosed by the entries as they were made. On the alleged facts, which are of course open to be rebutted at the trial, it appears to us that there is a case of a completed gift and a transfer of ownership in favour of the plaintiff ; and, if ownership in the bonus was completely transferred, and there was more than a mere promise without consideration to give the plaintiff a bonus, it is immaterial that the amount was originally of the nature of a bonus.

The case must go back for hearing evidence and disposing of it upon its merits. The defendants have since the disposal of the suit become insolvent and are now represented by the Official Assignee. The respondents must bear the costs of this appeal which will come out of the estate. The costs of the suit will abide and follow the result. The appellant will be entitled to a refund of the Court-fee on the appeal.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. —I agree with my Lord the learned Chief Justice in the order proposed and only wish to add this. I do not at all see why the plaintiff's claim should not be deemed to be based on a contract, apart from any question whatever of a contemplated gift, or a completed gift, or apart from any relationship between the parties of depositor and depositee or creditor and debtor. No doubt, if the services of the plaintiff had been rendered only for the salary stipulated, a promise of a grant of bonus to him would not be a promise for past consideration. But all those who know anything of these Muhammadan firms know that, apart altogether from the salary paid to the servants of the firm, the expectation is held out to them, according to the *mamool* or practice, that, if they should render exceptionally good service during the period of the settlement, they would be rewarded at the time of the settlement by the grant of a substantial bonus. If, in these circumstances, the servants put forth extra work which the masters find satisfactory and, in consideration thereof, a bonus is promised to them, it seems to me that it is really in law a promise for past consideration which is good under the Indian Law. It is for the purpose of establishing the implied agreement in such firms that, I take it, the plaintiff has referred in his plaint to the previous settlements, to the grant of bonus to the plaintiff at those settlements, to such bonuses having been credited at every

settlement to his account, and to his having operated upon the account so credited. I therefore consider that, even apart altogether from any question of gift completed or not, the plaintiff has a case on the footing of a contract which is clearly sustainable. The averments in the plaint are sufficient for the purpose. I, therefore, agree to the order proposed.

A. S. V. *Reversed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

R. V. Palanisami Pillai *Petitioner* (Respondent)*

v.

R. Srinivasarangachariar *Respondent (Petitioner).*

Madras (District Municipalities) Act V of 1920—R. 8 (e)—Election dispute—Revising authority—Admission of claim by—Validity of—If can be questioned in election dispute—"Preparation" in R. 8 (e)—Meaning.

The petitioner obtained 37 votes and the respondent 14 votes at a poll for filling up the vacancy of councillor in a Municipality. The respondent filed an election petition contending *inter alia* that the petitioner's name had been wrongly entered in the electoral roll and that therefore he was disqualified under S. 48(1) of Madras Act V of 1920.

The Court below found that, although the petitioner's name had not been clearly entered in the preliminary roll, the matter had been taken before the revising authority and his claim for registration had been admitted. The order admitting the claim was, however, signed by the Chairman and by only one of the unofficial gentleman nominated by the Collector. The Court below therefore held that the revision was *ultra vires* and unseated the petitioner as being an unqualified candidate.

Held, reversing the Court below, that the validity and conclusiveness of the register could not under R. 8 (*e*) of the Rules for the Preparation of Electoral Rolls be questioned in the election proceedings, and that the petitioner must be held to have been duly elected.

In R. 8 (*e*) the word "preparation" is used in general sense and includes the action of the revising authority.

Petition under S. 115 of Act V of 1908 and S. 106 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Trichinopoly dated 5th January, 1924, in O. S. No. 10 of 1923.

V L. Ethiraj for petitioner.

T. R. Ramachandra Aiyar and *S. Ramaswami Dikshit* for respondent.

The Court delivered the following

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*C. R. P. No. 26 of 1924. 16th July, 1924.

Palanisami Pillai v. Srinivasa-rangachariar.

JUDGMENT :—This case arises out of an election dispute in the Municipality of Srirangam. The petitioner in this Court Mr. R. V. Palanisami Pillai obtained 37 votes and the respondent Mr. Srinivasarangachariar 14 votes at a poll for filling up the vacancy of Councillor held on 29th September, 1923. The respondent filed an election petition contending *inter alia* that the petitioner's name had been wrongly entered in the electoral roll and therefore he was disqualified under S. 48 (1), Madras Act V of 1920. "No person shall be qualified for election as a Councillor unless the name of such person appears on the electoral roll." The Subordinate Judge of Trichinopoly enquired into the petition and found that, although the petitioner's name had not been clearly entered in the preliminary roll, the matter had been taken before the revising authority and his claim for registration had been admitted, Exs. D, D1. But the revising authority under R. 7 of the Rules for the Preparation of Electoral Rolls shall be the Chairman and two unofficial gentlemen nominated by the Collector and such authority shall sit in open Court. The order admitting the claim (Ex. D1) is signed by the Chairman and one unofficial gentleman. Therefore the learned Subordinate Judge has held that the revision was *ultra vires,* and has accordingly unseated the petitioner Mr. Palanisami Pillai as being an unqualified candidate. The petitioner does not now traverse this finding on its merits, but contends that the Judge inquiring into the dispute cannot go behind the electoral roll which is final. He relies upon R. 8 (*e*) of the Rules for the Preparation of Electoral Rolls. "No failure to observe the dates prescribed in these rules or to observe other directions regarding the preparation of the electoral roll shall entitle any one to question the validity and conclusiveness of the registers in election proceedings." As observed in his Order of Reference by Wallace J, who originally heard this civil revision petition, this rule would settle the question were there no ambiguity as to the meaning of the word 'preparation' which is sometimes in these rules themselves used to include revision, and sometimes to describe the preliminary stage before revision. Thus when the Act itself (V of 1920) S. 44 (1) enjoins that "The Chairman shall annually prepare and publish an electoral roll," both 'preparation and revision' are obviously included in the term 'prepare.' So too in rules 'preparation, claims and objections, revising authority and final publication' all fall under the main heading "Rules for the Preparation of Electoral Rolls

Palanisami Pillai v. Srinivasa-rangachariar.

in Municipalities" and "preparation" in this main heading must be used in a comprehensive sense. The sub-head 'preparation,' in Rr. 1 to 3, is in the restricted sense and refers entirely to the preparation of the preliminary roll. Compare R. 3 (*b*). Next come claims and objections and revising authority, still under the main general heading of 'preparation.' Then under the sub-head 'final publication' comes the rule in question 8 (*e*) 'failure to observe directions regarding the preparation of the electoral roll shall not entitle any one to question the conclusiveness of the register.' Taken by itself this must mean the general preparation and publication, for there could obviously be no sense in giving special finality to the preliminary preparation of the roll, the revision of which is expressly provided for. But in 8 (*f*) "the preparation, revision and publication of the electoral roll may take place on such dates, etc.," preparation is undoubtedly used as meaning preliminary preparation. While in 8 (*g*) "None of the officers entrusted with the preparation of the rolls shall be held legally liable for their completeness of accuracy" the word 'preparation' must again refer to the whole process, for it would be absurd to relieve from liability the officers who make the preliminary preparation but to deny the same relief to those engaged in the revision and publication. It must be taken therefore that 'preparation' is used both in a general and in a restricted sense in different portions of the same rules and we find that in R. 8 (*e*) 'preparation' is in the general sense and includes the action of the revising authority.

It was further contended on behalf of the respondent that election proceedings in R. 8 (*e*) is not intended to include an inquiry into an election dispute. No such distinction is to be found in the Act or Rules, and the word 'proceedings' is of the widest import and may well include an inquiry into an election dispute. The rules for decision of disputes are drawn up by virtue of the authority conveyed by S. 303 (2) (*b*) "he may make rules with reference to all matters relating to elections," and an inquiry held under rules must be regarded as an election proceeding.

Accordingly the validity and conclusiveness of the register cannot be questioned in these proceedings, and the petitioner Mr. R. V. Palanisami Pillai must be held to have been duly elected. The Civil Revision Petition is allowed with costs throughout.

A. S. V. *C. R. P. allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

N. C. Lakshmikutti Ammal *Appellant** (*Petitioner*)

v.

V. Mariathummal *alias* Thithumma and others *Respondents* (*Counter-Petitioners 2 to 7*).

Lakshmikutti *v.* Mariathummal.

Civil Procedure Code—O. 34, R. 14—Sale contrary to provisions of—Validity—Mortgage with possession and lease forming part of same transaction—Rent under lease—Decree for—Sale of mortgaged property in execution—Validity—Omission of judgment-debtor to raise plea of invalidity of order for sale in prior execution proceedings—Effect—Constructive res judicata—*Applicability of rule of, to execution proceedings.*

Held, that a mortgage with possession and lease back on the same day formed part of one and the same transaction.

Held further that although the mortgagee in such a case might obtain a decree for rent on the lease document alone, his claim would nevertheless be one arising under the mortgage, and a sale by him of the mortgaged property in execution of that decree would be within the mischief of O. 34, R. 14 of Civil Procedure Code.

Semble the principle of constructive *res judicata* is not applicable to execution proceedings.

A decree-holder cannot demand that the Court shall infringe a statutory provision merely because the judgment-debtor has omitted to demand that it shall not.

Appeal against the decree of the Court of the Subordinate Judge of Palghat in A. S. No. 61 of 1921, preferred against the order dated 24th January, 1921 of the Court of the District Munsif of Chowghat in E. P. No. 1742 (in O. S. No. 525 of 1916).

The following facts are relevant :—"By Ex. A, dated 17th June, 1907, the respondents mortgaged certain properties with possession to the appellant for a sum of Rs. 2,100 and on the same date by a separate registered instrument (Ex. B) took back the same properties on lease. The two documents were for the same period. No rate of interest was fixed in Ex. A, but the rent reserved in Ex. B worked out at 12 per cent. per annum on the principal amount under Ex. A. Ex. B referred to Ex. A. It further provided that if rent and Government revenue and *michavaram* payment were kept in arrears, they should be payable after the period fixed with interest at 1 per cent. per mensem either personally or by

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* A. A. A. O. No. 114 of 1922. 28th July, 1924.

Lakshmikutti v. Mariathummal.

sale of the equity of redemption. The appellant obtained a decree for rent due under Ex. B and in execution thereof sought to bring the properties comprised in Exs. A and B to sale. The appellant after an order for sale had been made withdrew the 1st E. P. as the respondents made certain payments. When in a subsequent E. P. for the balance he sought to bring them to sale he was met by the contention that such a sale was opposed to O. 34, R. 14. Both the lower Courts upheld the contention and dismissed the E. P."

K. P. M Menon for appellant.

T. A. Anantha Aiyar for respondent.

The Court delivered the following

JUDGMENT :—Appeal from the appellate order of the Court of the Subordinate Judge of Palghat (in E. P. No. 1742 of 1919 on the file of the Court of the District Munsif of Chowghat). There was a mortgage with possession and lease back on the same day. The appellant sued on the lease and obtained a decree and is attempting to bring the property to sale. The respondent resists, contending that such sale is contrary to the provisions of O. 34, R. 14 of the Civil Procedure Code. The lower Courts have upheld this contention, hence the appeal.

I agree that the two documents in question Exs. A and B must be treated as one. In Ex. B, it is agreed that arrears shall be paid by the sale of the equity of redemption, which appellant points to as marking a difference between the two transactions, but I do not consider that is sufficient to justify their being treated as separate documents. Once the two documents are treated as one it must, I think, be taken as settled law (as observed below the Calcutta rulings seem to be contradictory) that although the mortgagee may obtain a decree for rent on the lease document alone, nevertheless his claim is one arising under the mortgage and within the mischief of O. 34, R. 14. This has been ruled in terms in *Ibrahim Walad Goolam* v. *Nihalchand* (1) which is followed in *Raichand Kirparam* v. *Ranchhoddas Manchharam* (2). *Gobinda Chandra Pal* v. *Kailas Chandra Pal* (3) is to the same effect, as also the cases cited by the lower appellate Court *Kadma Pasin* v. *Muhammad Ali* (4). Appellant would distinguish this latter

1. (1919) I L R 44 B 366. 2. (1920) I L R 45 B 174.
3. (1917) I L R 45 C 530.
4. (1919) I L R 41 A 399.

Lakshmikutti v. Mariathammal

case on the ground that the mortgagor had merely contracted to collect the usufruct for the mortgagee, but I doubt if this affects the question, which turns on the actual contract effected between the parties and not on the motive which induced them to make such a contract. The appellant relies strongly upon the ruling in *Uttam Chandra Daw* v. *Rajkrishna Dalal* (5) the language of which on page 405 undoubtedly helps him. But in *Ashutosh Sikdar* v. *Beharilal Kirtania* (6) it is found that a sale in contravention of S. 99 of the Transfer of Property Act is irregular and voidable, and " the mortgagee is prevented from bringing the mortgaged property to sale in execution of a decree for the satisfaction of any claim related or extraneous to the mortgage " page 67.

It is next argued that the above plea is not open to the respondents, because without raising this plea, they submitted to prior execution proceedings which terminated in attachment and permission to the decree-holder to proclaim and sell by fresh petition.

No doubt the parties to execution proceedings are governed by the general law of estoppel, else there would be no end to the matter. They cannot continue to raise the same plea over and over again—but if the plea has never been raised before. I should hesitate to apply to execution proceedings the principle of constructive estoppel.

Careful consideration would have to be given to the circumstances of each particular case. However, there is no need to consider this aspect of the matter, in the present case, because the decree-holder cannot demand that the Court shall infringe a statutory provision merely because the judgment-debtor has omitted to demand that it shall not. Cf. *Gobinda Chandra Pal* v. *Kailas Chandra Pal* (3), " I do not think the decree-holder can raise a plea of estoppel when he must have known that he had himself induced the Court *ex parte* to pass an order to which he was not entitled." As soon as a Court is aware of an irregularity, it must avoid such irregularity *suo motu* irrespective of the intervention of the parties of their right to intervene.

The appeal fails on all grounds and is dismissed with costs.

A. S. V. *Appeal dismissed.*

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3. (1917) I L R 45 C 530 at 536. 5. (1919) I L R 47 C 377 (F B).
6. (1907) I L R 35 C 61.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Chittambala Mudaliar ... *Plaintiff*.*

v.

Parthasarathy Mudaliar and another ... *Defendants.*

Chittambala Mudaliar v. Parthasarathy Mudaliar.

Trustee—Compromise by, and decree on foot of—Validity as against trust—Conditions—Hindu Law—Joint family—Father—Will bequeathing properties to charity—Son's suit to set aside will on ground that properties bequeathed were joint family properties over which father had no disposing power—Compromise by which some of properties taken by son—Validity—Suit by executor-trustee to set aside decree—Limitation—Limitation Act, Art. 120—Applicability—Son brought in as trustee by compromise though testator expressly excluded him——Validity of compromise to that extent.

A Hindu bequeathed some properties by will in favour of charity. The executors under the will applied for probate thereof, whereupon the sons of the deceased testator entered a caveat contending that the will was brought about by undue influence and was invalid. They (the sons) also filed a suit for a declaration that the properties bequeathed by the will were joint family properties and that the deceased had no right to dispose of them by will. Both the application for probate and the suit were compromised, a *razinamah* was entered into between the executors and the sons by which two of the items were left for charity and the other items were taken by the sons, and a decree was passed in terms of the *razinamah.*

More than six years after the date of the said *razinamah* decree, the plaintiff, one of the executors, instituted a suit, *inter alia* for a declaration that the *razinamah* decree was void and of no effect and that all the properties belonged to the charity, and for recovery of the said properties from the sons.

The plaint did not allege that the compromise was brought about by fraud and that the plaintiff discovered the fraud only shortly before suit. The plaint alleged that the compromise was brought about by collusion, but there was no proof of any collusion. It was found that the contention of the sons that the properties bequeathed were joint family properties was one fairly open to them and that it was *bona fide* believed in by the parties and their vakils.

Held, that the *razinamah* was a fair settlement of the dispute between the parties and was valid and binding on the charity ; and that Art. 120 of the Limitation Act was applicable to the case, and the suit was barred.

By his will the deceased appointed the executors trustees and expressly excluded one of the sons from management of the trust property. Under the *razinamah,* that son was allowed to come in. It was contended that the compromise was invalid at least to that extent, because the executors, who were trustees had no right to get behind the terms of the will which had excluded the son.

Held, that the compromise was not invalid on the ground alleged, because neither of the executors had relinquished his right in favour of the said son.

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*C. S. No. 114 of 1922. 28th February, 1924.

Chittambala Mudaliar v. Parthasarathy Mudaliar.

Assuming that the testator's wish that a person should be excluded from trusteeship was binding upon the trust it does not take away the jurisdiction of the Court, in framing a scheme, to appoint such men, as it thinks fit to be trustees.

Civil Suit No. 114 *of* 1922.

T. L. Venkatarama Aiyar for plaintiff.

V V Srinivasa Aiyangar and *M. Sundaram Aiyar* for defendants.

The Court delivered the following

JUDGMENT :—The plaintiff is one of the executors of the will of one Ramanuja Mudaliar, a Hindu, who died on the 21st October, 1913. The defendants are the sons of Ramanuja Mudaliar. The plaint allegations are that the testator bequeathed the properties mentioned in the schedules to the plaint to charity, that the executors applied for probate of the will in T. O. S. No. 2 of 1914 and the defendants entered a caveat and contended that the will was brought about by undue influence and was invalid, that they (defendants) filed C. S. No. 103 of 1914, for a declaration that the property was joint family property and that the testator Ramanuja Mudaliar, who was a member of the joint family, could not dispose of the property of the joint family by will, that both T. O. S. No. 2 of 1914 and C. S. No. 103 of 1914 were compromised and a *razinamah* was entered into between the executors and the defendants on 20th October, 1914, as a result of which two of the items were left for charity and the other items were taken by the defendants and that the said *razinamah* is not valid and binding on the charity, for various reasons alleged in para. 9 of the plaint. The plaintiff prays for a declaration that the *razinamah*, dated 20th October, 1914 in C. S. No. 103 of 1914, is void and of no effect and that the properties, mentioned in Schedules A to D of the plaint, belong to the charity, for recovery of the properties in Schedules A to C from the defendants and for incidental reliefs.

The first defendant pleads that his father had no right to dispose of, by will, the joint family property belonging to himself, his father and his brothers, that the compromise was a *bona fide* one in the interests of all concerned and is not void for any of the reasons mentioned in the plaint and that the plaintiff is not entitled to any relief. The 2nd defendant adopts the written statement of the 1st defendant and states that the suit is the result of ill-feeling between the plaintiff and the defendants.

Chittambala Mudaliar v. Partha-sarathy Mudaliar.

The following issues have been framed

(1) Is the *razinamah* decree in C. S. No. 103 of 1914 invalid and not binding on the charity for any of the reasons stated in para. 9 of the plaint and, if so, is the plaintiff not entitled to question it ?

(2) Is the suit *res judicata* by reason of the decrees in C. S. No. 103 of 1914 and C. S. No. 250 of 1919 ?

(3) Is the suit barred by limitation ? and

(4) To what relief are the parties entitled ?

Issue 1.—The plaintiff's case is that the properties mentioned in the plaint schedules and other properties were acquired by Ramanuja Mudaliar and that the defendants had no right to them as they were the self-acquisition of Ramanuja Mudaliar. Ramanuja Mudaliar had no ancestral estate, worth mentioning, as evidenced by Ex. B, a partition deed, dated 10th June, 1880. He was a Sub-Assistant Surgeon and was attached to the General Hospital, and he seems to have acquired properties before 1902 (*vide* Exs. D, E, F, G, H and J.) After his retirement, he was employed in the State of Ghatwal and was paid Rs. 80 a month. He executed a will, Ex. K, on 8th September, 1910, and a codicil, Ex. L, on 8th March, 1911 wherein he bequeathed some properties to charity and gave some properties to his sons. He executed another will, on 2nd April, 1912, whereby he gave the items, mentioned in the plaint, to charity, subject to certain rights, in favour of his son's widow and his sons. The plaintiff says that the defendants had no right to any of the properties, as they were the self-acquisition of Ramanuja Mudaliar and that their contention in C. S. No. 103 of 1914, that the properties were joint family properties was an unfounded one and that for the peace of the family, the vakils for the executors and the defendants settled the disputes, whereby the charity has lost a considerable portion of the property.

The plaintiff is one of the executors of the will and was a party to C. S. No. 103 of 1914, as well as to T. O. S. No. 2 of 1914. His present allegation that it was brought about by collusion is not supported by any evidence. In the witness-box, as P. W. 1, he stated that there was ill-feeling between the father and the sons and the father was anxious that some property should be dedicated to charity and that he planted a stone in front of the house No. 1, in Chitrakulam Eastward

Chittambala Mudaliar v. Partha-sarathy Mudaliar.

Street, Mylapore, with an inscription, a photographic copy of which is marked Ex. A. In cross-examination, he admitted having written post-cards, Exs. IX, X, XI and XII, to the testator. From the post-cards it is clear that he complained to the testator, his father-in-law, that the sons were not looking after the charity properly. A reading of the post-cards shows that he was trying to influence the father against the sons. The mother of the defendants was dead at the time and Ramanuja Mudaliar was living with a woman, whom P. W. 1 calls a servant. But from his own post-cards, it is clear that he wanted some provision to be made for the woman; and that lends colour to the suggestion of the defendants that the woman was kept by Ramanuja Mudaliar, who was a widower at the time. On this meagre evidence, no inference can be drawn, in favour of the plaintiff's contention. D. W. 2, Parthasarathy Mudaliar, who is the 1st defendant, has proved Exs. XIV, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI and XXVII. These are letters and post-cards by the testator to the witness and it is quite clear from them that the father and son were on friendly terms and that the father asked the son to give up his work in the mofussil and to go to Madras and look after the family and that he should not mind about the loss he had sustained by the failure of Messrs. Arbuthnots. Exs. XIII series are money-order receipts, which show that D. W. 1 sent his savings to the testator for family expenses. He also says that the houses in Mylapore were improved at a cost of about Rs. 3,000 and the money borrowed for such improvements was liquidated partly by the savings of the 1st defendant. Ex. XXVIII, the accounts of the family from 1907 to 1913, show that the sums were received from time to time from the 1st defendant, when he was employed in the mofussil as an overseer. Exs. XV and XVII show that the 1st defendant paid the kist for the lands. D. W 3, the 2nd defendant, swears that he gave his earnings to his father. He does not produce any receipts but he says that whenever he happened to come to Madras he brought with him his savings. He also says that they all lived as members of a joint family and that all the earnings were thrown into the common stock. That they were treated as members of a joint family is clear from the letters and post-cards written by the testator to the 1st defendant. At that time evidently there was no intention on the part of the testator to treat the properties as self-acquisitions. He was

Chittambala Mudaliar v. Parthasarathy Mudaliar.

only anxious that the family should get on and that the eldest son should look after the family. Ramanuja Mudaliar had five daughters and three sons. After his retirement in about 1902 or 1903, he was out of Madras and sent his savings to the family for its support.

It is urged by the plaintiff that Ex. K, the will of 1910, was executed, with the knowledge and consent of the 1st defendant and therefore it must be presumed that the 1st defendant was willing to treat the property as the self-acquisition of the father. The explanation given by the 1st defendant is that the third brother Veerasamy was getting into the hands of Sowcars and incurring debts and that the father, in order to save the property from the clutches of Sowcars and money-lenders, executed the will of 1910, Ex. K. This is the very reasonable explanation for the execution of the will of 1910. Taking all the circumstances into consideration, it can be contended with some show of reason that the properties were joint family properties.

That being so, the question is whether the *razinamah* decree, Ex. I, was a *bona fide* settlement of disputes, between the parties or was brought about, in fraud of the charity, to which the testator dedicated some of his properties. The main contention of Mr. Venkatarama Aiyar, who appears for the plaintiff, is that the trustee has no right to give up any of the trust properties and that the trust cannot be made to lose, by reason of the neglect or carelessness or the fraud of the trustee. No doubt, in the case of a properly constituted trust and an ordinary trustee, great care will have to be exercised in settling a doubtful claim and the Courts will view with disfavour any arrangement which is not a fair and a *bona fide* settlement of a dispute, with regard to trust property. He relied upon *Ravi Varma Rajah* v. *Ramasubramania Pattar* (1) and *Wiles* v. *Gresham* (2). It is unnecessary to notice these cases in detail, for the circumstances of this case are different from those. Here a father bequeathed some property by will in favour of charity. The sons contended that the properties were joint family properties and that the father had no right to dispose of them by will. Under the Hindu Law, a member of a joint Hindu family cannot dispose of by will any portion of the joint family property. The question is whether the contention of the defendants was a *bona fide* one or not, or at

1. (1916) 31 M L J 733. 2. 43 E R 1069 : 24 L J Ch. 264.

least whether the parties and their vakils thought at the time, whether the contention was one which could be reasonably put forward in the circumstances of the case. Mr. Masilamony Pillai, who was till recently an acting Judge of the High Court, was vakil for the defendants in C. S. No. 103 of 1914 and T. O. S. No. 2 of 1914. He has been examined by the defendants as D. W. 1 and he says that taking into consideration all the evidence available at the time, documentary and otherwise, the parties came to a settlement and that the terms were settled in his office, in the presence of the plaintiff, as well as the other executor and of the defendants. He prepared a draft, Ex. VIII. It was given to the plaintiff and the other executor, who brought it back, after some time with alterations and Ex. VIII (*a*) was typed from that. He also says that Mr. Krishnier, vakil for the present plaintiff, as well as the other executor, had discovery of the documents in his possession and it was only after he was satisfied that the case was a fit one for compromise, that he and Mr. Masilamony Pillai settled the disputes between the parties. He also says that at that time, he thought the settlement, as evidenced by the *razinamah*, was a fair one, considering the disputes between the parties. He also says that the terms were settled after considerable discussion at more than one sitting in his office.

The defendants naturally complain that a good deal of evidence, which was available then, is not available now. The plaintiff, who was a party to the *razinamah* decree in 1914, has chosen to file a suit impeaching the *razinamah* in 1922. It may be that there is some reason for this complaint on the part of the defendants, but apart from that, what the Court has to see is whether in the circumstances, the arrangement was a fair and *bona fide* one, or whether it was brought about by collusion or fraud by reason of the carelessness of the trustees. The validity of the will was seriously contested. The power of disposition of the testator over the properties was very seriously attacked. The executors had to meet the case of the defendants with such materials as they had. That there is some ground for supposing that the properties were joint family properties is clear from the documents filed on the defendants' side to which I have already referred. Taking all these circumstances into consideration I have no hesitation in holding that the *razinamah* was a fair settlement of the disputes between the parties and the trust has not lost the properties, which it

would have otherwise, by reason of negligence, carelessness, collusion or indifference on the part of the executors, or fraud, or undue influence on the part of the defendants, or their vakil, Mr. Masilamony Pillai.

Of the six items devised to charity under Ex. C, two items alone were given to charity absolutely by the testator, that is, properties acquired under Exs. E and J. The properties acquired under Exs. F and G were given to charity, subject to a charge, in favour of Veerasami's widow for maintenance. The properties acquired under Exs. D and H were given to charity, only on failure of heirs to defendants 1 and 2. That being the disposition in the will, the arrangement under the *razinamah,* by which the trust got two properties, cannot be said to be an unfair arrangement.

Mr. Venkatarama Aiyar contends that Ex. A shows that the property, described in Schedule D, had been dedicated to charity in the life-time of the testator and therefore the trustees had no right to go behind that. The 1st defendant does not admit that the stone was planted by his father, but he says that the plaintiff, who is his own brother-in-law, was bitterly opposed to him and his brother on account of the 2nd defendant, who has married his daughter having discarded his wife. The mere planting of a stone in front of the building does not show dedication to charity, unless there be some more evidence in regard to dedication. But, as I have already found in favour of the contention of the defendants, that the property was joint family property, it is not necessary to discuss this question any further.

The next contention of Mr. Venkatarama Aiyar is that the probate proceedings cannot be compromised and such a compromise is invalid in law ; and he relies on *Monmohini Guha* v. *Banga Chandra Das* (3) and *Sundarambal Ammal* v. *Yogavanagurukkal* (4). In this case we are not concerned with a compromise of the T. O. S. No. 2 of 1914 for the relief asked for is only in respect of C. S. No. 103 of 1914. It is, therefore, unnecessary to consider this question.

His next contention is that the executors, who were trustees, had no right to get behind the terms of the will whereby the 2nd defendant was excluded from management of the trust property, and, under the *razinamah,* he is allowed to come

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3. (1903) I L R 31 C 357. 4. (1914) I L R 38 M 850 at 853 : 26 M L J 315.

Chittambala Mudaliar v. Parthasarathy Mudaliar.

in and therefore the compromise is invalid. And he relies on *Natgraja Thambiran* v. *Kailasam Pillai* (5). That case does not help him, because this is not a public office, in the sense that an *Archaka* office is a public office and neither the plaintiff nor the other executor has relinquished their rights in favour of the second defendant. In the case of a public charity, the Court has power to frame a scheme, and any two persons may apply under S. 92 of the Civil Procedure Code for the appointment of proper trustees and for framing a scheme of management. Granting for arguments' sake that the testator's wish that a person should be excluded from trusteeship is binding upon the trust, it does not take away the jurisdiction of the Court to appoint such men, as it thinks fit, to be trustees. Ex IV is the judgment in C. S. No. 250 of 1919, in which this matter was agitated and it was decided that the 2nd defendant should be appointed one of the trustees of the charity, and therefore there is nothing in this contention of the plaintiff.

I find Issue 1 against the plaintiff.

Issue 2.—This is not seriously pressed. I find it against the defendants.

Issue 3.—The defendants' contention is that the suit is barred by limitation. The plaintiff's answer is that there was fraud in bringing about the *razinamah* and therefore the suit is not barred by limitation. He also contends that inasmuch as the plaintiff seeks to recover trust property, there can be no limitation. The plaintiff himself was a party to C. S. No. 103 of 1914 and T. O. S. No. 2 of 1914. No doubt, in the case of a trust, a trustee can recover property, which was improperly alienated by him to the prejudice of the trust. But in this case, the plaintiff was only one of the executors and unless probate was granted, upholding the validity of the will, he will not be an executor. In other words, his position as executor depended upon the validity of the will and the testamentary power of the testator. That question having been settled by a decree of Court, it is difficult to see how the plaintiff can come in, without setting aside that decree. His allegation that the compromise was brought about, by fraud, is not even set out in the plaint. He only sets out in para. 9 of the plaint that it was brought about by collusion. He has not proved that. Even if he was able to prove collusion, he should have come in, within 6 years. He has not done so. He does not

5. (1920) I L R 44 M 283 : 39 M L J 98 (P C).

allege that there was any fraud which was discovered only recently. I therefore hold that the suit is barred by limitation.

I cannot conclude this case, without observing that the plaintiff has been actuated, not by laudable motives, but by ill-feeling towards the defendants, on account of the 2nd defendant, who is his son-in-law, having discarded his wife and married another. The feelings between the parties are evidently bitter, on this account, and the plaintiff, in order to keep the defendants out of the management of the trust properties, has filed this suit. I therefore direct that the plaintiff should pay the costs of the defendants out of his pocket. The defendants will have costs of the suit.

A. S. V. *Suit dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD ATKINSON, LORD SHAW, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Rajah Bahadur Narasingerji Gyanagerji, now deceased, represented by his legal representative, Rajah Dhanarajagirji. *Appellant** (*Defendant*)

v.

Rajah Panuganti Parthasaradhi Rayanim Garu and others *Respondents* (*Plaintiffs*).

Deed of mortgage by conditional sale—Contemporaneous deed of sale of same property, with collateral agreement for reconveyance on repayment of consideration money—Construction—Surrounding circumstances—Transfer of Property Act (IV of 1882), S. 58—Evidence Act (I of 1872), S. 92.

Where a deed purporting to be a mortgage of certain land by conditional sale was executed contemporaneously with a deed of sale of the same property together with a collateral agreement for reconveyance thereof upon repayment of the consideration money specified therein, *held,* that (1) in the construction of the documents and for the purpose of determining the true meaning thereof and the real nature of the transaction, and how the language of the documents was related to existing facts, the surrounding circumstances must be examined ; (2) the Evidence Act (I of 1872), S. 92, and the provisos thereto have not introduced into the Law of India such a radical change in the laws of evidence as would have the effect of excluding from the class of mortgages by conditional sale, within the meaning of S. 58 of the Transfer of Property Act, 1882, transactions which previously to 1872 would have been held within that class.

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*P C Appeal No. 47 of 1922. 19th June, 1924.

P. C.

Rajah Bahadur Narasingerji Gyanagerji v. Rajah Panuganti Parthasaradhi Rayanim Garu.

Appeal against a judgment and decree of the High Court of Judicature at Madras (24th February, 1921), which modified the decrees of the Subordinate Judge of Nellore (5th October, 1918 and 7th October, 1919) made in O. S. No. 1 of 1917.

The said suit was brought by the present respondents against the appellant, a money-lender carrying on business at Hyderabad, the Rajah of Kalahasti, who was not a party to the present appeal, being joined therein as second defendant; and related to certain villages in the Zamindari of Kalahasti, which had, on the 4th August, 1908, been the subject of a transaction between the defendants, amounting either to a mortgage by the Rajah for Rs. 6,00,000 or to a sale by him for the said sum, with a collateral agreement for reconveyance on repayment of the said sum on the 31st August, 1914.

The plaintiffs alleged that the said sum had been duly tendered on the said date, and prayed in their plaint on either footing for a decree for a reconveyance and for possession and other relief. Both Courts found that the tender had been duly made. The Subordinate Judge (K.Sundaram Chetty, Esq.) passed a decree for redemption on the footing that the said transaction of 1908 was a mortgage ; the High Court on appeal (Sir John Wallis, C. J., and Oldfield, J.) took the other view as to the character of the transaction, and substituted a decree that the first defendant do convey and deliver the said lands to the plaintiffs together with the mesne profits. The Chief Justice in the course of his judgment observed :—

" The facts that there was no discussion as to the price, that the money was obtained to avert a Court sale, and that the fact which I hold to be fully established that the alleged price was out of all relation to the market value, are circumstances which no doubt point to a mortgage rather than a sale. If we were at liberty to apply the decisions of Courts of Equity in England, I think that these findings would support the inference that the conveyance (Exhibit X) was originally intended as a security for money, and must be treated as a mortgage. As observed by the learned Editor of Coke on *Littleton,* 204 (*b*), in a note which is cited by Story—' If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him ; if he was not let into immediate possession of the estate ; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only

P. C.

Rajah Bahadur Narasingerji Gyanagerji v. Rajah Panuganti Parthasaradhi Rayanim Garu.

retained the amount of the interest; or if the expense of preparing the deed was borne by the grantor, each of these circumstances has been considered by the Court as tending to prove that the conveyance was merely pignoratitious.' I do not think the decisions referred to in support of these propositions are inconsistent with the later decision in *Alderson* v. *White* (1) but it has been held by the Privy Council, as regards transactions which no doubt arose before the Transfer of Property Act, that these equitable decisions are inapplicable in India, *Balkishen Das* v. *W F. Legge* (2), where their Lordships, after referring to the provisions of S. 92 of the Indian Evidence Act, observed that cases such as these 'must be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the documents is related to existing facts.' This ruling which was followed in *Jhanda Singh* v. *Wahid-ud-din* (3) and has been approved in *Maung Kyin* v. *Ma Shwe La* (4), which, however, was not a case of sale deed and agreement to reconvey, clearly refers to the language of proviso 1 to S. 92 of the Indian Evidence Act; and the surrounding circumstances referred to in that proviso are circumstances which enable the Court to ascertain and give effect to the full intention of the parties as expressed in the document itself, and evidence of surrounding circumstances is not admissible under the proviso for the purpose of contradicting the terms of the document. Following these decisions, this Court has recently held in *Muthuvelu Mudaliar* v. *Vythilinga Mudaliar* (5) that, although S. 58 of the Transfer of Property Act recognises mortgages by conditional sale where the mortgagor ostensibly sells the mortgaged property on condition that, on payment of the mortgage money on a certain date, the buyer shall transfer the property to the seller, the section has not the effect of raising a presumption that a sale with an agreement to reconvey is a mortgage; and, having regard to the decisions just cited, I think we are precluded from holding this transaction to be a mortgage, unless it appears on the face of the documents, read in the light of the surrounding circumstances, that

1. (1858) 2 De G & J 97.
2. (1899) I L R 22 A 149 : L R 27 I A 58.
3. (1916) I L R 38 A 570 : L R 43 I A 284.
4. (1917) L R 44 I A 236 : 33 M L J 648 (P C).
5. (1919) I L R 42 M 407 : 36 M L J 385.

P. C.

Rajah Bahadur Narasingerji Gyanagerji v. Rajah Paunganti Partha-saradhi Rayanim Garu.

it was the intention of the parties that it should be a mortgage. A strict application of this rule may have the effect of excluding most of these transactions from the class of mortgages by conditional sale ; but, on the other hand, it will have the effect of putting an end to the uncertainty in which these transactions have been involved and the litigation to which they have given rise. This appears to me to be the only alternative if we are precluded from treating transactions of this kind as mortgages on the ground on which, I think, the Courts of Equity formerly proceeded, that it would be equitable to give effect to them as sales."

Against the said decree of the High Court the present appeal was preferred by the first defendant. The said two deeds, dated the 4th August, 1908, are as follows :—

"This Indenture made by way of conveyance, this 4th day of August, 1908, between Umade Rajaha Raje Damara Kumara Thimmanayunim Bahadur Varu, son of Umade Rajaha Raje Damara Kumara Venkatappanayanim Bahadur Varu, C. S. I., late Rajah of Kalahasti, Varu, Velama (hereinafter called the vendor) of the one part and Rajah Bahadur Narasingerji Gyanagerji, son of Rajah Bahadur Gyanagerji 'Goswami' Sahu of Hyderabad (hereinafter called the purchaser) of the other part ; whereas the said vendor is seized of the villages more particularly described in the schedules hereto annexed for an estate of inheritance in possession and whereas the said villages were mortgaged to Rajah Sri Velugoti Venugopala Krishna Yachendra Bahadur Varu by a deed of hypothecation, dated 20th June, 1893, executed by Umade Rajaha Raje Damara Kumara Muthu Venkatappanayanim Bahadur Varu (hereinafter called the mortgagor) the then Zamindar of Kalahasti, for a sum of Rs. 5,39,922-11-0 (Five lakhs thirty-nine thousand nine hundred and twenty-two and annas eleven) and whereas in pursuance of the said deed of hypothecation, the said mortgagee sued the Rajah of Kalahasti in the District Court of Nellore in Original Suit No. 7 of 1899 and obtained a decree for Rs. 5,92,917-10-0 (Five lakhs ninety-two thousand nine hundred and seventeen and annas ten) together with further interest thereon and whereas in execution of the said decree, he, the said mortgagee, had realised, by bringing to sale the villages described more fully in Schedule B and by other means, the sum of Rs. 3,73,844-6-7 (Three lakhs

P. C.

Rajah Bahadur Narasingerji Gyanagerji *v.* Rajah Panuganti Parthasaradhi Rayanim Garu

seventy-three thousand eight hundred and forty-four rupees, six annas and seven pies) and, for the rest of the decretal amount and interest due thereon, had attached the properties set forth in Schedule A and the same is proclaimed for sale which is to take place on the 8th day of August 1908 and whereas the vendor has, in order to prevent the property being sold in public auction and realising much less than what they are actually worth, agreed to convey, by private sale, the said villages to the said purchaser for the sum of Rs. 6,00,000 (Six lakhs only). Now this Indenture witnesseth that in pursuance of the said agreement and in consideration of Rs. 5,60,445-9-0 (Five lakhs sixty thousand four hundred and forty-five and annas nine only) to be paid to the mortgagee in full satisfaction of the said decree in O. S. No. 7 of 1899 and Rs. 39,554-7-0 (Thirty-nine thousand five hundred and fifty four and annas seven only) this day paid to the vendor thus making up the full consideration of Rs. 6,00,000 (Six lakhs) the receipt of which the vendor doth hereby acknowledge, he, the said vendor as beneficial owner, doth hereby grant and convey unto the said purchaser, his heirs, executors, administrators and assigns all those villages situate in the Taluk of Pamur in the District of Nellore and specified in Schedule A together with all buildings, erections, cutcheries, rivers, tanks, reservoirs, water-courses, channels, pastures, feedings, wastes, commons, trees, woods, underwoods, fishings, fisheries, rents, quit-rents, *jodies*, services, royalties, jurisdictions, liberties, privileges, easements, profits, advantages, rights, emoluments and hereditaments whatsoever to the villages appertaining or reputed to appertain or at the time of the conveyance demised, occupied or enjoyed with the same or reputed or known as part, parcel or member thereof, subject to the conditions and reservations mentioned below.

"1. All the rents due from the ryots in the villages conveyed and all other rents, quit-rents and produce of the said villages shall belong to and be enjoyed by the purchaser as from the 1st day of July, 1908, and in case the vendor had collected any portion of the revenue and rent of the villages sold hereunder for Fasli 1318, the vendor should make good to the purchaser the sum so collected for the said Fasli 1318.

"2. The vendor should hand over to the purchaser all records relating to the villages sold hereunder with the offices of those villages and the furniture therein.

"3. The *jodi, mamool, rusums,* etc., which the vendor had been receiving from the *shrotriems, inams* and other villages sold hereunder should in future be

P. C.

Rajah Bahadur Narasingerji Gyanagerji v. Rajah Panuganti Parthasaradhi Rayanim Garu.

payable to and receivable by the purchaser, his heirs, executors, administrators and assigns.

"4. The vendor reserves to himself the sole right to the minerals and mineral rights including marble in the villages mentioned in Schedule A hereto annexed and the right to re-purchase the said villages as per the terms of the agreement of this day's date executed by the purchaser to the vendor, the said right to be exercised only on or after the 31st August, 1912, and only on or before the 31st August, 1914, and to be in strict accordance with the terms set forth in the document above referred to and in case the vendor should desire to work the minerals or assign it to others for quarrying and should, for the purpose, require the possession and occupation of the lands which do fetch or are likely to fetch rent, he should pay therefor to the purchaser the rent payable on such lands and unless and until such payment is made or agreed to be made, the vendor shall not open quarries or take up the lands for quarrying and similar purposes.

"5. The rights, rents and privileges appertaining to any lease made and given by the vendor, and subsisting on the date of this sale-deed shall pass to the purchaser and the vendor shall have no manner of right thereto and if the lessees had made any deposits with the vendor for the due carrying out of the terms of their leases, or as premium or advance rent in respect of their holdings the whole or so much of the same as shall appertain to the rent, etc., payable in respect of the holdings for any period subsequent to the said 1st day of July, 1908, should be paid by or made good by the vendor to the purchaser.

"6. The purchaser shall pay at the prescribed times the proportionate *peishcush*, road-cess, etc., due to Government on the villages of the Pamur Taluk sold hereunder and if any default be made in respect of the same he shall be answerable for any damages that may be incurred by the vendor on account of such default.

"In witness whereof the said parties have hereunto set their hands and seals this 4th day of August, 1908.

(Sd.) RAJA DAMARA KUMARA THIMMANAYUNIM BAHADUR.
(,,) RAJA BAHADUR NARASINGERJI GYANAGERJI.

"*Witnesses*:—

(Sd.) REVUR JAGANNADHA RAO,
(,,) C. NARASIMHACHARIAR,
(,,) S. KRISHNASWAMI MUDALIAR,
(,,) SAKHARAM PANDHARINATH, *Pleader*.
(Signed in Balabund) CHANDRABAN GIR."

[Here followed the schedules.]

"Articles of agreement made this fourth day of August, One thousand nine hundred and eight between Rajah Bahadur Narasingerji Gyanagerji Sahu of Hyderabad (hereinafter called the vendor) of the one part and Umade Rajaha Raje Damara Kumara Thimmanayunim Bahadur Varu (hereinafter called the purchaser) of the other part for the reconveyance of the villages specified in the schedule attached to the deed of the sale executed this day of August, 1908, by the Umade Rajaha Raje Damara Kumara Thimmanayunim Bahadur Varu in

favour of the said Rajah Bahadur Narasingerji Gyanagerji and more fully particularised in the schedule. It is hereby agreed between the parties hereto as follows :—

" (i) The vendor agrees to sell and the purchaser to purchase the villages mentioned in the conveyance of sale already referred to for a sum of Rs. 6,00,000 (six lakhs), the said sum to be paid by the purchaser to the vendor on the 31st August, 1912, the 31st day of August 1913 or 31st August, 1914 and not earlier.

" (ii) The vendor shall execute a deed of sale in favour of the purchaser, his heirs, executors and assigns as soon thereafter as the said sum of Rs. 6,00,000 (six lakhs) be paid to the vendor and the vendor shall be entitled solely to the possession and enjoyment of the villages hereunder agreed to be conveyed till such sum is paid and a conveyance in due form executed.

" (iii) If the vendee fails to pay the amounts mentioned in cl. 2 before the 31st day of August, 1914, as above-named, the vendee shall lose all his rights of re-purchase and this agreement shall then cease to be operative and valid. In case the purchaser pays to the vendor the said sum of Rs. 6,00,000 (six lakhs) on the 31st August, 1912, 1913 or 1914, as above set forth and a conveyance in due form is executed the purchaser is to become entitled to all rents and profits derivable from the said villages as from the 1st day of July, 1912, 1913 or 1914 respectively and any sums, rents, etc., collected or any profits accrued by or to the vendor in respect of the period commencing from the said 1st July shall be paid and refunded by him to the purchaser.

" (iv) If, after the date of this agreement and before the sale deed is executed, Government takes up any portion of the land hereunder agreed to be conveyed under the Land Acquisition Act and award compensation thereof, any compensation so awarded, shall, unless Government otherwise expressly provides, be deemed to be equivalent to 20 years' rent of the land acquired and the vendor and purchaser shall be entitled each to his proportionate share of the compensation money. The share of the money due to the purchaser being, if need be, given credit for towards the sale price of Rs. 6,00,000 (six lakhs) already mentioned and agreed upon.

" In witness whereof the said parties have hereunto set their hands and seals this day and year first above set forth.

(Signed in original in Balabund) RAJA BAHADUR NARASINGERJI GYANAGERJI.

(Sd.) RAJA DAMARA KUMARA THIMMANAYUNIM BAHADUR VARU.

" *Witnesses* :—

(Sd.) REVUR JAGANNADHA RAO,
(„) C. NARASIMHACHARLU,
(„) S. KRISHNASWAMI MUDALIAR,
(„) SAKHARAM PANDHARINATH, *Pleader*.
(Signed in original in Balabund) CHANDRABAN GIR. "

[Here followed the schedules.]

Clauson, K. C. and *K. V. L. Narasimham* for appellants.

W. H. Upjohn, K. C. and *Kenworthy Brown* for respondents.

P. C.

Rajah Bahadur Narasingerji Gyanagerji v Rajah Panuganti Parthasaradhi Rayanim Garu.

Lord Blanesburgh.

19th June, 1924. The Judgment of the Board was delivered by

LORD BLANESBURGH :—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 24th of February, 1921, modifying a decree of the Subordinate Judge of Nellore, dated the 5th of October, 1918, and made in the Original Suit No. 1 of 1917.

Issues raised by the appellant necessitated in the Courts below, and particularly in the Court of the Subordinate Judge, (whose judgment their Lordships would at once observe is conspicuous for its ability, care and completeness,) a prolonged investigation and examination of conflicting evidence. Concurrent findings against the appellant on every issue of fact raised by him have, however, greatly narrowed the ambit of the dispute as presented to the Board, and no more than two questions—difficult and important questions, it is true—have survived for discussion before their Lordships.

Of these, one only has so far been argued. But it raises the fundamental dispute between the parties, which may be described as an "issue as to the true nature of the transaction of the 4th of August, 1908, between the appellant and the late Rajah of Kalahasti" (now represented by the respondents his assignees) as a result of which the properties in suit passed to the appellant. The transaction is evidenced by two documents referred to throughout the proceedings as Exhibits X and U. Did it effect, as contended for by the respondents, merely a mortgage by conditional sale of the properties in suit, or was it, as contended by the appellant, an absolute sale of these properties to himself, with an agreement on his part to reconvey on the strict performance by the Rajah of certain defined conditions ?

In this suit, the respondents, who, as already indicated, had succeeded as auction purchasers to the outstanding rights in the properties of the Rajah, claimed to redeem them on the footing that the transaction in question was a mortgage. Alternatively, they claimed to have the properties reconveyed to them upon payment of the purchase price on the ground, that if, contrary to their main contention, the transaction did amount to an out and out sale, the conditions entitling the Rajah to a reconveyance had been all complied with by him, and in his shoes they now stood.

P. C.

Rajah Bahadur Narasingerji Gyanagerji v. Rajah Panuganti Partha-saradhi Rayanim Garu.

Lord Blanesburgh

In the Trial Court, the respondents succeeded on their main case. In the Court of Appeal they succeeded on their alternative case. The learned Subordinate Judge held that the transaction amounted to a mortgage by conditional sale. The High Court on appeal felt themselves constrained upon the authorities to hold that, in view of the terms of Exhibits X and U, the transaction must be held to have been an absolute sale of the properties to the appellant. But they found also (agreeing in this with the learned Subordinate Judge) that the conditions entitling the Rajah to a reconveyance on that footing had been performed and that the respondents, as his successors in interest, were entitled to have the properties assured to them on payment of the prescribed price.

From that order of the High Court the present appeal is brought. Mr. Clauson, for the appellant, did not ask their Lordships to review the conclusion of the High Court that all the conditions entitling the Rajah to a reconveyance had been performed. That conclusion—strenuously contested in the Courts below—now rested on concurrent findings of fact which he could not before the Board seek to displace. The appellant's sole ground of appeal, indeed, was that the right to a reconveyance reserved by Exhibit U was personal to the Rajah and did not pass to any assignee. As, however, the appellant's views on this matter raised very difficult questions of law, and as Counsel recognised that no success with them would avail him anything if the respondents were to establish before the Board, as they had done before the Subordinate Judge, that the transaction with the appellant did in truth amount to a mortgage, Mr. Clauson with the approval of the Board, confined his argument to that question on the understanding that, if their Lordships ultimately accepted upon it the view in his favour taken by the High Court, the substantive issue raised by the appellant in his appeal would become the subject of subsequent discussion before the Board.

In accordance with that arrangement, the vital question whether the transaction in question did or did not amount to a mortgage has been fully argued before their Lordships, and with that problem alone they now propose to deal.

It seems to their Lordships that they can dispose of the present case with no reference to any oral evidence, other than that of surrounding circumstances such as, in Lord Davey's

P. C.

Rajah Bahadur Narasingerji Gyanagerji v. Rajah Panuganti Parthasaradhi Rayanim Garu.

Lord Blanesburgh.

words, in *Balkishen Das* v. *Legge* (2) are clearly required to show in what manner the language of the documents was related to existing facts.

To a consideration of these circumstances their Lordships now proceed.

The Rajah of Kalahasti—party to the transaction in question—succeeded in 1905 to the Taluk of Pamur. The Taluk consisted of 223 villages, and at the succession of the Rajah it was in a state of the utmost embarrassment.

It had been for some time in the hands of the Court of Wards, but, earlier in the same year, that Court had handed it back to the Rajah's nephew and predecessor. The property was heavily encumbered. It was subject to a mortgage of the 20th of June, 1893, in favour of Rajah Venugopal, who in 1899 had obtained a mortgage decree in respect of his debt amounting then to about 6 lakhs. In March, 1908, in pursuance of his decree, he had proceeded to a Court sale of 27 villages part of the Taluk, and had realised thereby a sum of about 3 1|2 lakhs, but that price was being challenged by the Rajah for inadequacy, and inadequate it seems to have been. Nor was the decree-holder content with his partial realization, and his purpose was to bring the remaining 196 villages to sale for the balance of his debt which, with interest, then amounted to nearly 6 lakhs, and he had actually obtained an order fixing that sale for the 8th of August, 1908.

Such was the position when the transaction now in question was entered into. It was carried out four days earlier—on the 4th August, 1908. Six lakhs were required by the Rajah to avert a Court sale. The appellant, a rich moneylender of Allahabad, provided that sum. It was provided after very slight, if any, inquiry. The transaction, whatever it was properly called, was not the result either of any bargaining as to the value of the property conveyed or as to the price to be paid. The six lakhs were required and they were found. That was all.

That sum had no relation to the value of the 196 villages comprised in the deed of assurance. On this matter the Board are in full agreement with both Courts below. As the learned Chief Justice points out, the 27 villages had in the previous March fetched as much as Rs. 3,46,000 and that price was being challenged for inadequacy. There was no evidence and

2. (1899) I L R 22 A 149 : L R 27 I A 58.

no reason to suppose that the 27 villages differed materially from the 196 villages still remaining unsold, still less that they differed to such an extent as to make the value of these 27 villages equal to two-thirds of the value of the 196. The evidence as to the gross income of the 196 villages led to the same conclusion. It was the view of the learned Subordinate Judge that the value of these 196 villages amounted in 1908 to 15 or 16 lakhs at the least. The learned Chief Justice had no hesitation in concurring so far in that view as to hold that, in August, 1908, 6 lakhs would have been a most grossly inadequate price and much less than could have been realised by private sale or even by a Court sale. Their Lordships have examined the evidence on this subject for themselves and they are in entire agreement with the learned Chief Justice as to its result. And that is sufficient. They desire to add, however, that, had it been necessary, they would have been prepared to endorse in its entirety the finding of the learned Subordinate Judge on this point.

Thus informed of the circumstances surrounding the execution of X and U, their Lordships are now in a position to examine these documents so as to ascertain from their provisions and necessary implications the real nature of the transaction to which they give effect.

Exhibit X, described as an "indenture made by way of conveyance"—their Lordships will refer to it as the conveyance—describes the Rajah as *vendor* and the appellant as *purchaser*. It begins with a recital of the title of the Rajah to the 196 villages in question ; it goes on to recite the mortgage of June, 1893 ; the decree for sale and the sale of the 27 villages ; and the fact that the remaining villages are proclaimed for sale on the 8th of August then current. The final recital is as follows :—

> "And whereas the vendor has, in order to prevent the property being sold in public auction and realising much less than what they are actually worth, agreed to convey by private sale the said villages to the said purchaser for Rs. 6,00,000."

Their Lordships will return to this recital in due course. The conveyance then witnesses that, in consideration of Rs. 5,60,445 paid to the decree-holder in satisfaction of his debt and Rs. 39,554-7 paid to the vendor, the vendor as beneficial owner grants and conveys the properties, "subject to the conditions and reservations mentioned below," to the purchaser, "his heirs, executors, administrators and assigns in fee simple

P. C.

Rajah Bahadur Narasingerji Gyanagerji v. Rajah Panuganti Partha-saradhi Rayanim Garu.

Lord Blanesburgh.

absolutely." Then follow covenants for right to convey, quiet enjoyment, and further assurance and for indemnifying the purchaser, etc.

> "Against all losses, damages, expenses, claims and liabilities whatsoever if any which he or they may pay, sustain, incur or be put to by reason or in respect of the purchase thereof."

The principal conditions and reservations are :—

1. All rents are to belong to and be enjoyed by the purchaser as from 1st July, 1908.

2. The vendor reserves to himself the sole right to the minerals and mineral rights including marble in the villages and the right

> "To repurchase the said villages as per the agreement of this day's date executed by the purchaser to the vendor, the said right to be exercised only on or after the 31st August, 1912, and on or before the 31st August, 1914, and to be in strict accordance with the terms set forth in the document above referred to."

In Exhibit U, the agreement just referred to, the appellant appears as vendor and the Rajah as purchaser. It is expressed to be made for the reconveyance of the 196 villages specified in the schedule attached to the conveyance, and cl. 1 provides that

> "The vendor agrees to sell and the purchaser to purchase the villages mentioned in the conveyance for Rs 6,00,000, the said sum to be paid by the purchaser to the vendor on the 31st August, 1912, the 31st August, 1913, or the 31st August, 1914, and not earlier."

By clause 2 the vendor is to execute a deed of sale in favour of the purchaser as soon thereafter as the said sum of Rs. 6,00,000 is paid to the vendor, and the vendor is to be entitled solely to the possession and enjoyment of the villages. . till such sum is paid and a conveyance in due form executed.

By clause 3 it is provided that if the purchaser fails to pay the amount mentioned in clause 2 *before* the 31st August, 1914, as above mentioned, the purchaser shall lose all his right of repurchase and that agreement shall then cease to be operative and valid. In case the purchaser pays to the vendor the said sum of Rs. 6,00,000 on the 31st August, 1912, 1913 or 1914, as above set forth, and a conveyance in due form is executed, the purchaser is to become entitled to all the rents and profits derivable from the villages as from the 1st day of July, 1912, 1913 or 1914 respectively.

P. C.

Rajah Bahadur Narasingerji Gyanagerji v. Rajah Panuganti Partha-saradhi Rayanim Garu.

Lord Blanesburgh.

Clause 4 is very important. Its terms are these :—

"If after the date of this agreement and before the sale deed is executed, the Government take up any portion of the land hereunder agreed to be conveyed under the Land Acquisition Act and award compensation therefor, any compensation so awarded shall, unless Government otherwise expressly provides, be deemed to be equivalent to 20 years' rent of the land acquired, and the vendor and the purchaser shall be entitled each to his proportionate share of the purchase money. The share of the money due to the purchaser being, if need be, given credit for towards the sale price of Rs. 6,00,000 already mentioned and agreed upon."

Their Lordships do not conceal from themselves the fact that the transaction as phrased in these documents is ostensibly a sale, with a right of repurchase in the vendor. This appearance, indeed, is laboriously maintained. The words of conveyance needlessly iterate the description of an absolute interest, and the rights of repurchase bear the appearance of rights in relation to the exercise of which time is of the essence.

But a closer examination of the documents discloses their real character. Take for example the final recital of the conveyance to which reference has already been made. What is its true implication ? A consideration of the facts known to both parties makes it, their Lordships think, reasonably plain. The parties knew two things quite well. First, that 6 lakhs was an absurd purchase price. Secondly, that even at public auction the properties could be expected to realise a larger sum than that. What then was the implication ? Surely that the transaction in which they were engaging was not a sale but a loan. For notice how that principle is worked out. The Rajah has not only an option to repurchase. He is put under an obligation to buy if the appellant thinks fit to require him so to do. The appellant's 6 lakhs can be recovered by him if he chooses to sue upon the Rajah's contract to re-purchase, he remaining in possession and enjoyment of the rents and profits of the properties until that price is paid.

Again, is time of the essence of the exercise by the Rajah of his rights in this matter ? Cl. 4 of the agreement already set forth indicates to their Lordships that it is not. That clause seems also to be clear enough although it describes an arrangement very unusual in character. The clause is providing for the possibility of the appellant being compulsorily expropriated by Government from some part of the property in suit, and the receipt by him of the compensation in respect thereof. The compensation is to be treated as the equivalent

P. C.

Rajah Bahadur Narasingerji Gyanagerji *v.* Rajah Panuganti Parthasaradhi Rayanim Garu.

Lord Blanesburgh.

of 20 years' rent ; it is to be treated as belonging to the appellant and the Rajah according to what would have been their rights *inter se* to possession of the expropriated lands during these years ; the money is to be received by the appellant as being in possession, but, *if need be*—these are the critical words —credit is to be given to the Rajah for his share by a deduction from the 6 lakhs otherwise payable by him on re-purchase.

These words show that in certain circumstances such credit will not be his. But what must these circumstanecs be ? They can only be a repurchase more than 20 years after the expropriation. But if time was of the essence for such repurchase it could in no circumstances be postponed beyond six years from the date of the conveyance. Clearly, therefore, and within the intendment of the documents themselves time is not of the essence in this matter ; and so soon as that is established all pretence for holding this ostensible sale and repurchase to be anything else than a mortgage by conditional sale disappears, and its establishment reinforces several other considerations leading to the same conclusion such as the reservation of the right in the conveyance itself ; the reservation of minerals which is directed, in their Lordships' view, to a restriction on the appellant's usufructuary privileges ; the strange covenant of indemnity and the inconsistent and almost unintelligible provisions as to the actual time limited for the exercise of the Rajah's so-called right of repurchase. When all these provisions of the documents are viewed in the light of the surrounding circumstances, the inference is, in their Lordships' view, irresistible that here a mortgage, and a mortgage only, was in the direct contemplation and intention of both parties to the transaction.

Such was the conclusion of the Subordinate Judge. Such was apparently the belief of the learned Judges of the High Court, but they felt themselves precluded from giving effect to that belief by their hesitation to attribute, what their Lordships hold to be their real result, to the considerations emerging from the terms of the documents to which attention has here been drawn.

In these circumstances, their Lordships find it unnecessary to deal with the numerous authorities upon this subject which they have examined. The case in their view is abundantly clear. They would only observe before parting with it that,

P. C.

Rajah Bahadur Narasingerji Gyanagerji v. Panuganti Parthasaradhi Rayanim Garu.

Lord Blanesburgh.

as at present advised, they must not be taken to subscribe to the view that there has been introduced into the law of India such a radical change in the laws of evidence as is suggested by the learned Chief Justice, a change which would have the effect of excluding from the class of mortgages by conditional sale many transactions which, before the Evidence Act, would have been held to be within that class.

The present case with the shifts and devices, to which the appellant resorted to deprive the respondents of all their rights in the property, if the character of a mortgage could not be attached to the transaction, show how serious such a conclusion would be.

Without most careful consideration their Lordships would hesitate to accept a view which would bear so hardly on many mortgagors expressing their contracts of borrowing in long accepted Indian forms.

The respondents in their Lordships' judgment are entitled to a redemption decree. They are chargeable with interest at the rate of 6 per cent. per annum from the 1st of September, 1914, down to the date when the six lakhs were paid into Court. The appellant will be entitled to the interest earned by that sum since it was so paid in.

On the other hand, the appellant must account to the respondents for mesne profits of the properties as from the 1st of July, 1914, until actual delivery of possession to the respondents. The order of the High Court should be discharged and with these variations, the decree of the learned Subordinate Judge should, in their Lordships' opinion, be restored.

Their Lordships will humbly advise His Majesty accordingly.

The appellant must pay all the costs of the respondents in the High Court and their costs of this appeal.

Solicitor for appellant : *H. S. L. Polak.*

Solicitor for respondents : *Douglas Grant.*

A de M. *Order of High Court discharged.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD SHAW, LORD BLANESBURGH, AND MR. AMEER ALI.

Maharaja Kesho Prasad Singh *Appellant** (*Defdt. No. 2*)

v.

Sheo Pargash Ojha and others *Respondents* (*Plaintiffs*).

P. C.

Maharaja Kesho Prasad Singh v. Sheo Pargash Ojha.

Civil Procedure Code (V of 1908), S. 11—Hindu Law—Powers of widow to mortgage husband's estate—Suit by husband's reversioners to set aside mortgage—Subsequent suit by reversioners for possession—Agra Tenancy Act, S. 79—Grove land—Suit for—Limitation.

O, a Hindu widow in 1892, having failed to pay her proportion of revenue assessed upon the share of her deceased husband, *M*, in certain land, *N*, the owner of another share therein (the appellant) thereupon paid the whole and then sued *O* to recover her proper proportion, and obtained judgment for Rs. 564-5-4 and interest. *O* then borrowed Rs. 1,000 (with part of which she paid off this judgment) from *P* on the security of a mortgage, dated 25th December, 1899, of *M's* said share in respect of the whole loan. On the 31st March, 1903, *P*, the lender, eventually obtained a decree for the amount then due upon his mortgage, and in execution thereof, he purchased, and was duly put into possession of this share. Later this new owner, *P*, himself defaulted in payment of his share of assessment, and the appellant, as before, was compelled to pay the whole. He in due course sued *P* for his proportion, obtained a decree for Rs 698-1-9 in execution of which he purchased, and was duly put in possession of the property on 20th June, 1912, and remained such until the death of *O* in 1914.

In the meantime, immediately after the aforesaid decree of the 31st March, 1903, *D*, the then presumptive reversioner to the estate of *M*, sued and on 21st June, 1904, obtained against both *P* and *O* a declaration that the aforesaid mortgage to *P* was void as being an alienation without legal necessity and consequently that *P's* decree, dated 31st March, 1903, could not avail in respect of the deceased *M's* share and interest in the lands comprised therein beyond the lifetime of his widow *O*. *O* died in September, 1914. In an action brought in 1917 by the reversionary heirs of *M* against *N* for the recovery of possession of *M's* said share, *held*, (affirming the judgment of the High Court) that the decree of the 21st June, 1904, was *res judicata* under S. 11 of the Civil Procedure Code, and was binding and conclusive against *N* as the successor in interest of *P* in favour of those who were now entitled to the reversion.

Venkata Narayan v. *Subhamal*, L R 42 I A 125 and *Janaki Ammal* v. *Narayanaswami Aiyar*, L R 43 I A 207 referred to.

Appeal against the decree of the High Court of Judicature at Allahabad (9th July, 1921) which affirmed a decree of the Subordinate Judge of Ghazipur (3rd September, 1918) and made in Civil Suit No. 185 of 1917. The suit was brought by the present respondents as reversionary heirs

*P C Appeal No. 43 of 1923. 29th July, 1924.

P. C.

Maharaja Kesho Prasad Singh v. Sheo Pargash Ojha.

of Ram Manohar Ojha, deceased, for possession of a share in certain lands from the appellant. The facts appear sufficiently from the judgment of their Lordships. The prior proceedings are reported in *Kesho Prasad Ojha* v. *Sheo Pragash Ojha* (1).

L. De Gruyther, K. C. and *K. Brown* for appellant.

H. S. Abdul Majid for respondents.

29th July, 1924. The Judgment of the Board was delivered by

Lord Blanesburgh.

LORD BLANESBURGH :—This is an appeal against a decree of the High Court of Judicature at Allahabad of the 9th of July, 1921 affirming a decree of the Subordinate Judge of Ghazipur of the 3rd of September, 1918.

The suit was brought by the respondents against the appellant for the possession of certain lands described in the plaint. These lands consisted of a 2 anna 8 pie share in a permanently settled mouzah called Pachrokhia : and a grove No. 526 in Mouza Balihar.

A decree has been passed substantially as prayed. The defendant appeals.

The facts raising such questions in the suit as remain for their Lordships' consideration may be compendiously stated.

The respondents have been found to be, as they alleged they were, the reversionary heirs of one Manohar Ojha who died without issue in 1856. At his death he was entitled as part of his estate to both properties in suit. In Pachrokhia, the appellant, who is the present Maharaja of Dumraon, was also interested as the owner of an eight annas share.

Manohar Ojha left three childless widows him surviving. Oudha Koer was the last survivor of the three. She died in 1914. Thereupon, the succession to the estate of Manohar Ojha opened to the respondents as his reversionary heirs. After Oudha Koer's death exclusive possession of both properties in suit was found to be in the appellant under the following circumstances.

First as to Pachrokhia. That Mouza was in great part diluviated, and in 1892 Oudha Koer, by this time in possession of her deceased husband's share, failed to pay her proportion of the revenue assessed upon it. The appellant had to pay the whole and he sued Oudha Koer to recover her proper proportion. In January, 1894, a decree for Rs. 564-5-4 and interest was passed in his favour and to meet this debt Oudha Koer

1. (1921) I L R 44 A 19.

P. C.

Maharaja Kesho Prasad Singh v. Sheo Pargash Ojha.

Lord Blanesburgh.

borrowed from one Kishan Prasad the amount due, viz. Rs. 587 together with a further sum, making in all Rs. 1,000, and she gave to Kishan Prasad by way of security a mortgage of Manohar Ojha's interest in Pachrokhia, dated 25th of December, 1899, for the whole sum borrowed.

On the 31st of March, 1903, Kishan Prasad obtained decree for the amount then due on his mortgage, and, in execution, he purchased, on the 16th of November, 1904, Manohar Ojha's two and two-third annas share in Pachrokhia and he was placed in possession.

Later Kishan Prasad, himself made default in payment of his share of revenue of Pachrokhia. The appellant as before was compelled to pay the whole assessment. He then sued Kishan Prasad for his proportion and obtained a decree for Rs. 698-1-9. This decree he executed against the property, which was purchased by him at auction on the 20th June, 1912. He was placed in possession, and he so remained at the death of Oudha Koer in 1914.

Such was the title to this property set up by the appellant in the suit.

Their Lordships will deal separately with his claim to the Grove.

Now, so far, the question as to Pachrokhia, between the respondents as reversionary heirs of Manohar Ojha and the appellant would depend, primarily at least, upon the question whether the mortgage made by Oudha Koer, a Hindu widow, in favour of Kishan Prasad was for legal necessity so as to be binding on the estate of Manohar Ojha. And this issue was found in favour of the respondents by the Subordinate Judge in the present suit.

In the High Court, however, the decision against the appellant was based upon another ground, dependant upon a further fact which their Lordships now proceed to state.

Immediately upon Kishan Prasad obtaining, on the 31st March, 1903, as above mentioned, his decree for sale on the basis of his mortgage of the 25th of December, 1899, Dhanai Ojha, the then presumptive reversioner to the estate of Manohar Ojha sued Kishan Prasad and Oudha Koer for a declaration that the alienation to him by the widow was without legal necessity, that that alienation and the decree obtained thereon by Kishan Prasad could not affect Pachrokhia otherwise than

P. C.

Maharaja Kesho Prasad Singh v. Sheo Pargash Ojha.

Lord Blanesburgh.

for the lifetime of the widow, and that neither was binding upon the reversionary body. And in that suit a decree was passed on 21st June, 1904, in the plaintiff's favour as against both the widow and Kishan Prasad.

This decree affects the appellant's claim, it is said, in two ways. First of all, the purchase by the appellant on the 16th of November, 1904, from Kishan Prasad was subsequent to the decree and it is suggested with great force that all that was then purchased by the appellant consisted of the rights and interests of the widow in Pachrokhia, as these had been declared by the order of the 21st of June, 1904. Their Lordships feel the force of this view but they do not propose to dispose of this part of the case in reliance upon it.

Like the Court of Appeal they will decide this question on the second ground which emerges from the decree of the 21st of June, 1904. In their Lordships' judgment that decree obtained by Dhanai as against the widow and Kishan Prasad is binding as between the parties to the present suit. No Court in India can now, as the Board think, go behind it, and, as it was therein held that the transfer to Kishan Prasad was not binding on the estate after the death of the widow, the respondents as the reversionary heirs are now in their Lordships' judgment, by virtue of that decree, entitled to possession. The Board agrees with the High Court in thinking that this result necessarily flows from the judgment of their Lordships in *Venkata Narayana* v. *Subhammal* (2) delivered by Mr. Ameer Ali. After pointing out that the Indian law permits the institution of suits in the lifetime of the female owner for a declaration that an adoption made by her is invalid or an alienation effected by her is not binding against the inheritance, Mr. Ameer Ali there lays it down that the object of the second class of suit as of the first class

"is to remove a common apprehended injury to the interest of all the reversioners, presumptive and contingent alike,........In both 'the right to sue' is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights."

And the law is expounded in the same sense by their Lordships in the later case of *Janaki Ammal* v. *Narayanasami Aiyar* (3). They there observe as follows :—

"........a reversionary heir........is recognised by Courts of Law as having a right to demand that the estate be kept free from waste and free

2. (1915) 42 I A 125 at 129: 28 M L J 535.
3. (1916) 43 I A 207: 31 M L J 225.

P. C.

Maharaja Keshe Prasad Singh v. Sheo Pargash Ojha.

Lord Blanesburgh.

from danger during its enjoyment by the widow or other owner for life........ a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity so that the corpus of the estate may pass unimpaired to those entitled to the reversion."

The operation

"is justified by the consideration of keeping the estate intact for the person to whom, as reversioner, it shall ultimately and at the proper time be determined that the estate shall go."

These words, in their Lordships' judgment, accurately describe in relation to this property the suit of Dhanai Ojha which eventuated in the decree of the 21st of June, 1904. That decree is binding on the appellant as the successor in interest of Kishan Prasad and of the benefit of it the respondents are now possessed as the heirs of Manohar Ojha in the event "entitled to the reversion." To the present case the application of this principle is obvious and eminently salutory. It would be *pessimi exempli* that the appellant, whose predecessor in interest failed on the same issue and was content to accept the adverse judgment against him, should be held entitled, years afterwards, when it might be, much of the relevant evidence was no longer available, to raise the same issue all over again. Their Lordships of course recognise that the principle is less obviously just where it operates to bind the ultimate reversioners by the result of a suit in which a plaintiff had failed whose interest, then merely presumptive, never ultimately matured. The danger of a feigned issue in such a suit is not to be overlooked.

But this danger is mainly serious where the failure of the first suit has been brought about by fraud or collusion where, of course, further and different considerations would arise. In their Lordships' judgment there is no answer either in principle or in fact to the contention of the respondents that the decree of the 21st of June, 1904, is conclusive of their claim to this property.

Their Lordships can dispose very shortly of the appellant's claim to the second property in suit—the Grove No. 526. On the death of the widow the appellant wrongfully took possession of it and he now contends that the property within the meaning of the Tenancy Act is "land held for agricultural purposes" and that the period of limitation for a suit to recover it is, under S. 79 of that Act, six months only. With

P. C.

Maharaja Kesho Prasad Singh v. Sheo Pargash Ojha.

Lord Blanesburgh.

the High Court their Lordships are of opinion that it is impossible to hold that that section has any application whatever to such property as the Grove in fact is.

In their Lordships' opinion the appeal entirely fails : and they will humbly advise His Majesty that it be dismissed and with costs.

Solicitors for appellant *T. L. Wilson and Co.*

Solicitors for respondents *Chapman, Walker* and *Shephard.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Ramaswami *alias* Palunna Nathan, minor, by guardian 2 and 3 and others.. *Appellants** (*Defdts.*)

v.

M. P. M. Muthayya Chetti (Receiver in O. S. No. 46 of 1910 on the file of the Court of the Temporary Subordinate Judge of Ramnad at Madura) *Respondent* (*Plaintiff*).

Ramaswami v. Muthayya Chetti.

Partnership—Suit by partner to recover money due in respect of partnership—Limitation—Suit for accounts barred—Suit on judgment—Maintainability.

A claim by a partner to recover a sum of money from the other partners in respect of a transaction of the partnership must form part of the enquiry in the action for winding up the partnership and no suit will lie therefor after a suit for an account is barred by limitation. *Gopala Chetty* v. *Vijayaraghavachariar,* I L R 45 M 378 (P. C.) referred to.

No action lies in India on an executable judgment and the remedy of the judgment-creditor is by execution. But where a judgment creates a new obligation without providing for execution, a suit on the judgment is maintainable. *Mancharam Kalliandas* v. *Bakshe Saheb,* 6 B H C R 231 ; *Annoda Prasad Banerjee* v. *Nobo Kissore Roy,* 9 C W N 952 relied on. *Periaswami Mudaliar* v. *Seetharama Chettiar,* (1903) I L R 27 M 243 ; *Merwanji Nowroji* v. *Ashabai,* (1915) I L R 8 Bom 1 ; *Kali Charan Nath* v. *Sukhoda Sundari Debi,* 20 C W N 58 ; *Ramanand* v. *Jai Ram,* (1920) I L R 43 A 170 distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in O. S. No. 13 of 1920.

A. Krishnaswami Aiyar and *M. Patanjali Sastri* for appellants.

K. Bhashyam Aiyangar for respondent.

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*Appeal No. 136 of 1922. 1st October, 1924.

Ramaswami v. Muthayya Chetti.

Ramesam, J.

The Judgment of the Court was delivered by

RAMESAM, J.:—The facts of this appeal may be briefly stated:—

The plaintiff, the 1st defendant's father and two others carried on a partnership business at Zanzibar. O. S. No. 143 of 1909 was filed in the Subordinate Court of Madura East for its dissolution. In that suit, the present plaintiff was the 5th plaintiff, and the father of the present 1st defendant was the 1st defendant. A preliminary decree was passed on 27h October, 1909, and a Commissioner was appointed. The Temporary Subordinate Court of Ramnad, to whose file the suit was then transferred, confirmed the report of the Commissioner. Paragraph 6 of the order confirming the report runs as follows:—"It is therefore ordered that the 1st defendant do forthwith pay into Court the sum of Rs. 2,611-6-3 being the amount found due to the partnership by him, that, in default of such payment, the 5th plaintiff is appointed Receiver to realise and collect the said amount with power to bring and defend suits in his own name, etc. (*see* Ex. D)." The final decree (Ex. E) of the Subordinate Court was passed on 14th October, 1911. It says, "that out of the amount collected by the 5th plaintiff as Receiver in realising the only item of assets of Rs. 2,611-6-3 due from the 1st defendant, he (the 5th plaintiff) do take, etc.." There was an appeal to the District Court and the High Court and the Subordinate Court's decree was finally confirmed by the High Court on 5th February, 1917. Meanwhile there was an attempt to execute the decree of the Subordinate Court in E. P. No. 309 of 1914. The Subordinate Court of Ramnad held that the decree was unexecutable and that it contemplated that the 5th plaintiff as Receiver should sue the 1st defendant to recover the amounts (Ex. G, dated 26th October, 1914). There was no appeal against this order and the order is now binding on all the parties. The result is that the decree must be construed, in the light of that order, to be a decree declaring or creating rights which are unenforceable in execution and can be enforced only by suit.

The present suit is presented on 4th February, 1920, for recovering the said amount. The plaintiff obtained a decree and defendant appeals.

He contends that the suit is not maintainable and is barred by limitation. It is true, as he points out, that a claim to

Ramaswami v. Muthayya Chetti. —— Ramesam, J.

recover a sum of money due from one of the partners must form part of the inquiry in the action for winding up the partnership and no suit will lie after a suit for an account is barred by limitation. *Gopala Chetty* v. *Vijayaraghavachariar* (1). But the respondent contends that the judgment (as construed by the order of 26th October, 1914, Ex. G) creates fresh rights in the place of the older rights and this suit is an action on the judgment. This is obvious, and, provided there is no obstacle in India to a suit on a judgment, when there is no other remedy to enforce the right, the contention ought to prevail.

At Common Law, actions on judgment lie whether the remedy by execution is available or not. [See *Williams* v. *Jones* (2); *Hutchison* v. *Gillespie* (3); *Marbilla Iron Ore Co.* v. *Allen* (4); and Black on *Judgments*, Vol. II, S. 958]. This is admitted by the appellant. In India it is settled that no action lies on an executable judgment, the only remedy being execution, the principle being embodied in S. 47, Civil Procedure Code. (S. 244 of the Code of 1882). An exception was at one time recognised by which suits were permitted to be brought in the High Court on judgments of a Court of Small Causes in order to obtain execution against immoveable property *Bhavanishankar Shevakram* v. *Purusadri Kalidas* (5). On the ground that 'where an action on the judgment will give a higher or better remedy, the case is different' [see *Mancharam Kalliandas* v. *Bakshe Saheb* (6)]. The exception is now obsolete. (S. 94 of Act XV of 1882). But Couch, C. J. also says in the case last cited "There are cases in which an action may be the only mode of enforcing a judgment or decree." The present case is such a case. In *Mahommed Ghouse Cooroo-shee* v. *Mustan Ally* (7) Scotland C. J., and Bittleston, J. recognised that such a suit would lie proceeded to discuss the question of limitation. The further remarks in *Bhavani-shankar Shevakram* v. *Purusadri Kalidas* (5) were intended to apply only to executable judgments. The decision in *Merwanji Nowroji* v. *Ashabai* (8) is also based on the policy of the Civil Procedure Code and applies only to judgments capable of execution. So also are the remarks in *Periaswami*

1. (1922) I L R 45 M 378 : 43 M L J 305 (P C).
2. 13 M & W 628 at 633.
3. 11 Exch. 798.
4. 47 L J (C. P.) 601.
5. (1882) I L R 6 Bom. 292 at 297.
6. (1869) 6 B H C R 231.
7. (1869) 4 Mad. Jurist 127.
8. (1883) I L R 8 Bom 1.

Ramaswami v. Muthayya Chetti. — Ramesam, J.

Mudaliar v. *Seetharama Chettiar* (9) " As against the judgment-debtor himself or against his legal representatives it has long been held that under the Indian Processual Law, the remedy is only *by way of execution of the decree* and that no suit could be brought upon the judgment." The decision in *Annoda Prasad Banerjee* v. *Nobo Kissore Roy* (10) shows a suit is maintainable on a judgment where no mode of execution (other than proceedings in contempt) is available. Sale, J. says that that was the practice of the Court, referring to *Attermony Dossee* v. *Hurry Doss Dutt* (11). The case in *Kali Charan Nath* v. *Sukhoda Sundari Debi* (12) those cited in it [*Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (13) and *Ashi Bhusan Dasi* v. *Pelaram Mandal* (14)] are not strictly relevant as they are cases where execution against the judgment-debtor on record was useless and it was sought to obtain on a judgment against another person for substantially the same relief. The remarks in *Ramanand* v. *Jai Ram* (15) apply only where there is another mode of enforcing the judgment.

In our opinion, there is nothing in all the Indian authorities cited before us against the maintainability of the suit. Such a case can occur only very rarely. Ordinarily the Indian Courts pass judgments which are to be enforced in execution and even when they create new relation involving fresh rights and obligations, they provide for working out the rights in execution. Rarely do they create a new obligation without providing for its execution and indicating a suit as the only method of enforcing it. But when they do, as in the case, the suit is maintainable.

We accordingly hold that the suit is maintainable. If so, the only period of limitation that is applicable to it is Art. 122. There was no old cause of action on which such a suit would be maintained nor does it subsist if it ever existed. The judgments created a new obligation in lieu of the old. The suit is therefore within time

The appeal fails and is dismissed with costs.

A. V. V. *Appeal dismissed.*

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9. (1903) I L R 27 M 243 at 249 : 14 M L J 84.
10. (1905) 9 C W N 952.
11. (1881) I L R 7 C 74.
12. (1915) 20 C W N 58.
13. (1878) I L R 4 C 342.
14. (1913) 18 C L J 362.
15. (1920) I L R 43 A 170.

In the High Court of Judicature at Madras.

Present :—Mr. Justice Srinivasa Aiyangar.

Ramalinga Adaviar and another *Appellants** (*Plaintiffs*)

v.

Meenakshisundaram Pillai and others *Respondents* (*Defendants.*)

Ramalinga Adaviar *v.* Meenakshisundaram Pillai.

Contract Act, S. 74—Penalty—Chit Fund—Subscriptions payable monthly—Provision for payment of whole of the arrears in case of default in payment of instalment.

Plaintiff was the stake-holder of a chit fund and the defendants were the holders of one chit. The chit holders were 10 in number and each chit was of Rs 400 per year. The defendants bid for the first chit and became entitled thereto as they offered to pay the highest amount of premium. The total amount pooled being Rs. 4,000 the defendants agreed to a deduction of Rs. 1,500 as premium and out of the balance of Rs. 2,500 deducting a sum of Rs. 400 payable for that chit and a further sum of Rs. 100 retained by stake-holder as advance towards the second chit payable by the defendants, the actual amount received by the defendant was Rs. 2,000. The defendants executed a bond for Rs. 3,500 in favour of the plaintiff containing the following among other provisions :—

"Out of this sum of Rs. 3,500 we shall pay you Rs. 300 for the second chit which is due on 15th December, 1918. From the third chit forward we shall pay you on 30th Karthigai of each year at the rate of Rs. 400 per instalment. If we fail to pay in this way we shall pay the amount due for the instalment for which we have failed to pay within six months, together with interest thereon at the rate of 2 per cent. per mensem from the date of default. If we fail to pay even in this way, we shall pay you on demand the whole of the remaining amount together with interest thereon at the aforesaid rate in a lump sum without reference to future instalments."

Held, that the provision with regard to the whole of the unpaid balance becoming due on default being made for six months after the date fixed for payment of any instalment, was penal and could be relieved against.

Where on a proper construction of the contract between the parties the debt itself arises or becomes due and payable by the debtors on the respective dates fixed for the instalments, the stipulation that on default being made in the payment of any instalment, the whole of the balance should become due and payable, would be in the nature of a penalty. If the real agreement between the parties was to the effect that the whole amount was on the date of the bond a debt due, but the creditor for the convenience of the debtor allowed it to be paid by instalments intimating that if default should be made in the payment of any instalment he would withdraw the concession, then the stipulation as to the whole amount of the balance becoming payable would not be penal.

John Wallingford v. *The Directors of the Mutual Society,* 5 A C 685 ; *Periaswami Thalavar* v. *Subramania Asari,* (1904) 14 M L J 136, *Muthukrishna Aiyar* v. *Sankaralingam Pillai,* (1912) I L R 36 M 229 (F B) and *Vydianatha Aiyar* v. *Govinda Odayar,* (1921) 42 M L J 551 referred to.

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*S A No. 376 of 1922. 26th August, 1924.

Ramalinga Adaviar v. Meenakshisundaram Pillai.

Second Appeal against the decree of the District Court of Tinnevelly in A. S. No. 411 of 1919 preferred against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 20 of 1919.

A. Krishnaswami Aiyar for plaintiffs.

T. M. Ramaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The short and simple question in this Second Appeal is whether on a proper construction of the terms of the document, Ex. A., the provision is penal for the payment of the whole of the balance remaining due in default should be made in the payment of any instalment for a period of six months after the date fixed for payment. The plaintiffs are the stake-holders of a chit fund and the defendants for the purpose of this appeal may be referred to conveniently as holders of one chit. The document was executed by the defendants in relation to the first chit to which they became entitled as the bidders that offered to pay the highest amount of premium. The chit holders were 10 in number and each chit was of Rs. 400 per year. The total amount pooled being Rs. 4,000 the defendants at the auction agreed to a deduction of Rs. 1,500 as premium, and out of the balance of Rs. 2,500 deducting the sum of Rs. 400 payable by them for that chit and a further sum of Rs. 100 which was retained by the stake-holders as advance towards the second chit payable by the defendants, the actual amount received by the defendants was only Rs. 2,000. But as the sum of Rs. 400 had in any case to be paid by the defendants for the first chit I must take it that the actual amount received by the defendants was Rs. 2,400. Receiving that amount they executed the bond in favour of the plaintiffs for Rs. 3,500. The bond provides as follows :— " The amount which you have paid and which we have received from you as per particulars for consideration described below is Rs. 3,500. Out of this sum of Rs. 3,500 we shall pay you Rs. 300 for the second chit which is due on 30th Karthigai, 1094 (Andu 15th December, 1918). From the third chit forward we shall bring and be paying you on the 30th Karthigai of each year at the rate of Rs. 400 per instalment and make an endorsement of payment upon this. If we fail to pay in this way, we shall pay the amount due for the instalment for which we have failed to pay within six months together with

interest thereon at the rate of 2 per cent. per mensem from the date of default. If we fail to pay even in this way, we shall pay you on demand the whole of the remaining amount together with interest thereon at the aforesaid rate in a lump sum without reference to future instalments." For some reason best known, I dare say to the learned vakil for the appellant, perhaps having regard to the terms of Explanation 1 to S. 74 of the Indian Contract Act, he did not argue that the provision with regard to the payment of interest at the rate of 2 per cent. per mensem or 24 per cent. per annum on the amount of the instalment omitted to be paid on the due date would not be penal. He contended himself with arguing only that the provision with regard to the whole of the unpaid balance becoming due on default being made for six months after the date fixed for payment of any instalment was not penal. In support of his contention Mr. A. Krishnaswami Aiyar referred to the case of *John Wallingford* v. *The Directors of Mutual Society* (1). Though the facts of this case are somewhat complicated yet there is no doubt that the case has been always cited and accepted only as an authority for the position set out in illustration (*f*) to S. 74 of the Indian Contract Act. The learned Lords dealt with the case on the footing that the amounts secured by the bond were *debita in praesenti* although *solvenda in futuro* and the Lord Chancellor at page 696 goes on to say "and being such, it is consistent both with principle and with authority to hold, that if the party who ought to have paid them, or any of them, at the proper time failed to do so, the default was his own, and the time might lawfully be accelerated for the other payments which were originally deferred." Again at p. 705 Lord Blackburn from whose judgment the learned Vakil for the appellant cited passages on which he relied strongly, observes as follows :—" The agreement between the parties was, and it is obvious that what they meant to agree was, that £6,000 and the £5,000 odd in addition as the premium shall be a *debitum in praesenti* payable by instalments if the instalments are punctually paid, but if there be a default in paying them, then all is to be paid at once. That being the contract between the parties that is not the case of a penal sum. It is not necessary for the House probably to decide that question, but if it were necessary to decide it, I should say that it was not a penalty but an actual sum, like the case of a promis-

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(1880) 5 A C 685.

Ramalinga Adaviar v. Meenakshisundaram Pillai.

sory note payable by instalments, the whole to become due if one of the instalments is not punctually paid." The principle of the distinction would thus be seen to be very thin. If on a proper consideration and construction of the contract I should come to the conclusion that the real agreement between the parties was to the effect that the whole amount was on the date of the bond a debt due but the creditor for the convenience of the debtor allowed it to be paid by instalments intimating that if default should be made in the payment of any instalment he would withdraw the concession, then the stipulation as to the whole amount of the balance becoming payable would not be penal. But if, on the other hand, on a proper consideration and construction of the contract between the parties I should come to the conclusion that the debt itself is an instalment debt so to call it, that is to say, that the debt itself arises or becomes due and payable by the debtors on the respective dates fixed for the instalments, the stipulation that on default being made in the payment of any instalment the whole of the balance should become due and payable would be in the nature of a penalty. At first sight, no doubt it might seem that there is really no distinction at all between the two and that the difference consists merely in the way of putting it. But it seems to me that legally speaking the distinction is real. The whole principle of the law of penalty is this, as I understand it. The parties who enter into a contract no doubt expect that the contract would be carried out; but they also contemplate the possibility of the contract not being carried out and provide for such a case. If in making provision for breach of contract the promisee stipulates from the promisor on the breach only for such compensation as the Court would deem reasonable in the circumstances, then there is no penalty and the stipulation is not penal. But if, on the other hand, the Court would on a proper consideration come to the conclusion that the stipulation was put in not by way of reasonable compensation to the promisee but in order that by reason of its burdensome or oppressive character it may operate *in terrorum* over the promisor so as to drive him to fulfil the contract, then the stipulation is one by way of penalty. Applying these principles, it is obvious that if the debt itself should arise on a date fixed, the stipulation that on default of payment, there and then the whole of the balance should become due and payable would not by any means be reasonable compensation for default

in paying the instalment that has fallen due and payable only then but be really a stipulation by way of penalty. Several cases have been cited as to the question what constitutes a penalty. The case of *Salem Town Bank, Ltd.* v. *Venkatachar* (2) as well as the case of *Sukkulal Sowcar* v. *A. V Tirumal Rao Sahib* (3) proceeded upon the construction of the particular documents the Court had to consider. The case of *Periaswami Thalavar* v. *Subramania Asari* (4) contains no discussion of any principle and was decided before the Full Bench decision in *Muthukrishna Aiyar* v. *Sankaralingam Pillai* (5). As regards the case of *Vydianatha Aiyar* v. *Govinda Odayar* (6) I am unable to appreciate the reasoning of the learned Judge in some parts of the judgment. But for the purposes of the present case it is only necessary to observe that the judgment in that case proceeded on a construction of the document and contract before the Court and it seems to me that it was possible and perhaps proper having regard to the terms of the document in question in that case to hold that the liability was as observed in the case of *Wallingford* v. *The Directors of the Mutual Society* (1) *debitum in praesenti.* It is somewhat inexplicable how in the whole of the judgment in the case of *Vydianatha Aiyar* v. *Govinda Odayar* (6) there should have been no reference whatever to the Full Bench decision in *Muthukrishna Aiyar* v. *Sankaralingam Pillai* (5). After all, the question whether any particular stipulation is only by way of compensation or by way of penalty should depend upon the construction of the particular document or contract and on the circumstances of each case. I now turn therefore to the document before me, Ex. A. The question whether the parties to the contract treated the amounts for which the bond is given as *debita in praesenti* although *solvenda in futuro* is a question of intention to be gathered from the document itself. I do not find in the document any such intention. There is no clause in it by or under which the obligor binds himself to pay the whole amount, namely Rs. 3,500. The obligation undertaken is in terms to pay each instalment as it becomes due Rs. 300 on the 30th Karthigai, 1094 (Andu 15th December, 1918) and Rs. 400 on the 30th Karthigai of each succeeding year. This aspect clearly distinguishes the present case from such cases as *Wallingford*

1. (1880) 5 A C 685.
2. (1910) 9 I C 197.
3. (1918) 51 I C 295.
4. (1903) 14 M L J 136.
5. (1912) I L R 36 M 229 24 M L J 135 (F B).
6. (1921) 42 M L J 551.

v. *The Directors of Mutual Society* (1), *Periaswami Thalavar* v. *Subramania Asari* (4), *Muthukrishna Aiyar* v. *Sankaralingam Pillai* (5) and *Vydianatha Aiyar* v. *Govinda Odayar* (6). Therefore the primary obligation under the contract is to pay each instalment as it accrues due. One of the provisions for the breach of that primary contract is that if for a period of six months after any particular instalment becomes due and payable default should be continued to be made, then the whole of the balance should become due and payable. The question is whether this stipulation is or is not by way of penalty. If the requirement that the whole of the balance should be paid up at once can be regarded as reasonable compensation for the breach, the stipulation cannot be deemed to be one by way of penalty. But if, on the other hand, the burden of the stipulation is of such a character that it cannot possibly be regarded as merely intended for compensation to the promisee for breach of contract but has only to be regarded as a stipulation by the terror of which the promisor should feel pressed and compelled to perform the original contract itself, then the stipulation is one by way of penalty. A comparison and consideration of the two illustrations (*f*) and (*g*) to S. 74 of the Indian Contract Act would, it seems to me, yield to us the real principle to be applied in such case. At first sight, it may seem that there is no reason why if the stipulation for the payment of the entire balance on default in the payment of one instalment in illustration (*f*) is not one by way of penalty it should be so in illustration (*g*). The difference is this. On the facts given in illustration (*g*) the promisor has given to the promisee in the form of a promise to pay an enhanced amount as consideration for the promisor retaining the instalments not yet fallen due or in other words for the use of the moneys representing such instalments for the periods covered by the instalments. The stipulation in such a case for the whole amount of the balance becoming due and payable would involve for the promisor not only the liability to pay up the whole of the balance but the loss of the consideration he has already paid for the use of the moneys representing each instalment for the respective periods of the instalments. The principle underlying illustration (*f*) is that the whole of the debt being payable immediately the creditor

1. (1880) 5 A C 685. 4. (1903) 14 M L J 136.
5. (1912) I L R 36 M 229 : 24 M L J 135 (F B). 6. (1921) 42 M L J 551.

Ramalinga Adaviar v. Meenakshisundaram Pillai.

agrees with the debtor to allow him to pay the amount by instalments so long as he pays them regularly. But the principle underlying illustration (*g*) is that the debtor by paying consideration gets the right to retain and use the amount of each instalment until the date of its becoming due and payable. If therefore in such a case the debtor commits a breach and fails to pay one instalment no doubt he becomes liable to pay to the creditor damages for such breach, but to be called upon to pay the whole of the balance in spite of the fact that he has given consideration for withholding the amounts of the other instalments till their respective due dates would undoubtedly be in the nature of a penalty. As some effect has to be given to illustration (*g*) I do not see my way to base it on any other principle. Now with regard to the question whether the facts of the present case bring it within illustration (*f*) or illustration (*g*) the question be viewed in two ways. Is it a case in which the creditor being entitled to the whole amount allows the debtor to pay it by instalments on condition that if default should be made in the payment of one instalment the whole should become due ; or is it a case in which there is no present debt but the debt arises for the amounts of the instalments only on the respective dates fixed therefor. I have already held that on a proper construction of Ex. A that there is no present debt created for the whole amount and that the parties agreed that it is only on the due dates the amounts of the instalments should become due and payable. Another way of looking at it would be by seeing whether any consideration moved from the promisor to the promisee for the promisor retaining the amount of each instalment till the date fixed for the payment thereof. Whether the transaction is looked at as a promise by the promisor in consideration of the receipt of Rs. 2,400 to pay a sum of Rs. 3,500 by instalments or as a promise to pay the sum of Rs. 3,500 by instalments the creditor deducting therefrom there and then immediately the amount stipulated by way of interest for the use of the money during the periods of the instalments it seems to me that the principle of illustration (*g*) would apply. The essence of the transaction is that the actual consideration which reaches the hands of the debtor is less (and in this case considerably less) than the total amount which he binds himself to pay by way of instalments and that therefore the present case is on principle indistinguishable from illustration (*g*) to S. 74.

Ramalinga Adaviar v. Meenakshisundaram Pillai.

I have therefore come to the conclusion that the Lower Appellate Court was right in treating the stipulation for payment of the whole of the balance as penal. As already stated the learned vakil for the appellant has not argued that the stipulation as to payment of interest at 24 per cent. per annum is not penal, nor was there any contention advanced on behalf of the appellant that if the stipulation should be held to be penal the basis on which the Lower Appellate Court has awarded compensation to the plaintiff for breach is not reasonable or sound.

In the result therefore the Second Appeal fails and should be dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE JACKSON.

Peri Ramasami and others. *Appellants* in both the Appeals (Defendants 1, 2, 4 to 9)*

v.

Chandra Kottayya *Respondent in both (Plaintiff)*

Peri Ramasami v. Chandra Kottayya

Mortgage—Joint mortgagees—Subsequent undertaking to pay amount to one mortgagee—If a valid discharge—Rulings of High Court—How far binding on subordinate Courts—Fraud—Case not set out in pleadings—New case if allowable in appeal—Limitation Act, S. 19—What amounts to acknowledgment.

An undertaking given by a mortgagor subsequent to the date of the mortgage to pay the amount due to one of two co-mortgagees at a future date is not equivalent to a discharge of the mortgage. To amount to a valid discharge there must either be payment to one of the joint mortgagees or the other mortgagee must consent to the mortgage being superseded by the subsequent undertaking.

Barber Maran v. *Ramana Goundan,* (1897) I L R 20 M 461 ; *Annapurnamma* v. *Akkayya,* (1913) I L R 36 Mad 544 (F B) ; and *Shrinivasdas Bavri* v. *Meherbai,* (1916) I L R 41 Bom 300 at 308 (P C) referred to.

Under S. 19, Limitation Act, it is not necessary that there should be a promise to pay the amount due to constitute an acknowledgment. All that is necessary is an acknowledgment of the liability before the claim is barred.

A Court subordinate to a High Court is bound to follow the rulings of that High Court on any particular question and is not entitled to rely upon the decisions of other High Courts which take a different view of the law.

An Appellate Court cannot set up for the first time a case of fraud which has not been referred to in the pleadings.

Second Appeals against the decrees of the Court of the Subordinate Judge of Masulipatam in A. S. Nos. 25 and 26 of 1921 against the decrees of the Court of District Munsif of Avanigadda in O. S. Nos. 428 and 429 of 1918 respectively.

*S A Nos. 29 and 30 of 1922. 27th August, 1924.

Peri Ramasami v. Chandra Kottayya.

N. Rama Rao for appellants.

C. V Anantakrishna Aiyar for respondent.

The Court delivered the following

Devadoss, J.

JUDGMENTS :—*Devadoss, J.* :—These appeals arise out of two suits brought by the plaintiff on mortgage bonds dated 4th November, 1897 and 28th January, 1902. The District Munsif dismissed the plaintiff's suits. On appeal the Subordinate Judge passed decrees in favour of the plaintiff. Ex. A, dated 4th November, 1897, was executed by the defendants 1 and 2 and their deceased father and brother in favour of the plaintiff and the 3rd defendant. Ex. A (1) was executed on 28th January, 1902 by defendants 1 and 2 and their deceased father in favour of the plaintiff and the 3rd defendant. On 28th June, 1906 the defendants 1 and 2 and their father executed Ex. 1 in favour of the 3rd defendant undertaking to pay the balance due in respect of Ex. A and Ex. A (1) during a period of 10 years from 15th March, 1906. The first point urged for the appellant is that Exs. A and A (1) were discharged by payment to the 3rd defendant ; and reliance is placed upon two decisions of this Court reported in *Barber Maran* v. *Ramana Goundan* (1) and *Annapurnamma* v. *Akkayya* (2). The Subordinate Judge has declined to follow these rulings on the ground that the other High Courts have taken a different view and that one of the learned Judges of this Court expressed his disapproval of the Full Bench ruling in *Annapurnamma* v. *Akkayya* (2). We must express our strong disapproval of the Subordinate Judge's conduct in declining to follow the decision of this Court. A Court subordinate to the High Court is bound to follow the ruling of the High Court and is not entitled to rely upon the decisions of the other High Courts and to decline to follow the decision of this Court. The decision in *Annapurnamma* v. *Akkayya* (2) is a Full Bench ruling and even if it was not, it was not the function of the Subordinate Court to criticise the ruling. Coutts-Trotter, J., who expressed the opinion that the decision in *Annapurnamma* v. *Akkayya* (2) was opposed to the current of authorities in England, did nevertheless follow the ruling in *Annapurnamma* v. *Akkayya* (2). The Subordinate Judge found that there was a gross fraud on the part of the defendants 1, 2 and 3 and therefore the payment to the 3rd defendant did not bind the plaintiff. The plaintiff did not set up a case of fraud in the pleadings and no evi-

1. (1897) I L R 20 M 461 : 7 M L J 269.
2. (1913) I L R 36 M 544 : 21 M L J 333.

Peri Ramasami v. Chandra Kottayya.

Devadoss, J.

dence was adduced as regards fraud in the first Court, and the Subordinate Judge was not justified in setting up a case of fraud when such a case was not set up by the parties either in the pleadings or in the evidence before the first Court. No issue was taken as regards the question of fraud and no opportunity was given to the defendants to show that there was no fraud. On the other hand, it is quite clear from Ex. 1 that defendants 1 and 2 and their father did acknowledge their liability not only to the 3rd defendant but also to the plaintiff and therefore at that time there could not have been any intention to defraud the plaintiff. The 3rd defendant and the plaintiff are the adoptive mother and adopted son and the evidence is that they lived together for 20 years till 4 or 5 years ago and Ex. 1 was executed in 1906 evidently at the time when the 3rd defendant and the plaintiff were living together and there is no suggestion that at that time there was any intention on the part of the 3rd defendant or of defendants 1 and 2 to defraud the plaintiff. The Subordinate Judge has therefore erred not only in setting up a new case of fraud not set up in the pleadings but also in coming to the conclusion that there was gross fraud when there was no evidence to support the finding. In his anxiety to get round the decisions in *Barber Maran* v. *Ramana Goundan* (1) and *Annapurnamma* v. *Akkayya* (2) he has set up a case of fraud.

It is next urged by the appellants that the suit is barred by limitation. Mr. Rama Rao who appears for the appellants contends that Ex. 1 does not contain an acknowledgment of the liability of defendants 1 and 2 under Exs. A and A (1). From a reading of the document it is quite clear that the executants of the document did acknowledge the liability not only to the 3rd defendant but also to the plaintiff under the two documents. It is not necessary that there should be a promise to pay the amount due. All that is necessary under S. 19 of the Limitation Act is there should be an acknowledgment of the present liability before the claim is barred by limitation. There is no substance in this contention and we disallow it.

The judgment of the lower appellate Court can be supported on other grounds than that of fraud. Ex. 1 is a mortgage deed executed by defendants 1 and 2 and their father undertaking to pay the balance of the amounts due under Exs. A and A (1). This document was afterwards sued on

1. (1897) I L R 20 M 461 : 7 M L J 269.
2. (1913) I L R 36 M 544 : 21 M L J 333 (F B).

Peri Ramasami v. Chandra Kottayya.

Devadoss, J.

and money was realised. Ex. 1 cannot be taken to be a discharge of Exs. A and A (1). In *Barber Maran* v. *Ramana Goundan* (1) it was held that a payment made to one of two joint mortgagees was a valid discharge of the mortgage liability If money had been paid to the 3rd defendant certainly that would have been a valid discharge of the liability under Exs. A and A (1). But a mere undertaking to pay the amount at some future date is not equivalent to payment. It is quite clear from the decisions in *Barber Maran* v. *Ramana Goundan* (1) and *Annapurnamma* v. *Akkayya* (2) that it is only payment made to one of the joint promisees that could give a discharge to the promisors, but where the promisor undertakes to pay the amount at some future date it is not equivalent to a discharge. Supposing in this case the defendants 1 and 2 had given a promissory note to 3rd defendant for the amounts due under Exs. A and A (1) and if she had negotiated it to a third person and the third person realised the amount some time after, could it be said that the 3rd defendant has paid the amount due under Exs. A and A (1) ? It is open to the parties to a contract to supersede that contract by another contract. But in order to do so, all the parties to the first contract must be parties to the second contract. Ex. 1 cannot be considered as a supercession of the contracts evidenced by Exs. A and A (1). It is only an undertaking by the promisors to pay the amount to one of the promisees. We hold that in order to bring the case within the rulings in *Barber Maran* v. *Ramana Goundan* (1) and *Annapurnamma* v. *Akkayya* (2) there ought to be a payment of the amount due to one of the joint promisees in order to effect a discharge of the liability to the joint promisees. Taking this view we hold that Ex. 1 was not a discharge of Exs. A and A (1) and the liability under the two mortgages remained on the date of Ex. 1, and the plaintiff is therefore entitled to bring a suit for his share of the mortgage amounts. In the view we have taken, it is unnecessary to consider whether the decision in *Annapurnamma* v. *Akkayya* (2) is good law or not. It was contended on behalf of the respondent that the decision of the Privy Council in *Shrinivasdas Bavri* v. *Meherbai* (3) has considerably shaken the authority of the decision in *Annapurnamma* v. *Akkayya* (2). It is unnecessary for us to express

1. (1897) I L R 20 M 461 : 7 M L J 269.
2. (1913) I L R 36 M 544 : 21 M L J 333 (F B).
3. (1916) I L R 41 B 300 at 308 (P C).

Peri Ramasami v. Chandra Kottayya.

any opinion on this point.

In the result the Second Appeals fail and are dismissed with costs.

Jackson, J.

Jackson, J. :—I agree and will only add that in any case I should feel bound by the Full Bench ruling in *Annapurnamma* v. *Akkayya* (2). In *Shrinivasdas Bavri* v. *Meherbai* (3) it is held that a release deed purporting to be by one of two mortgagees both in his own right, and also as heir and legal representative of the other mortgagee deceased can only be evidence as against the parties to the deed. The respondent did not thereupon proceed to argue that the discharge by one mortgagee alone would be in itself valid, so the point established in *Annapurnamma* v. *Akkayya* (2) was never raised in *Shrinivasdas Bavri v. Meherbai* (3).

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE JACKSON.

K. M. P. R. N. M. Firm *Plaintiffs** (*Petitioners*)

v.

M. Somasundaram Chetti and Co. *Defendants* (*Respondents*).

K. M. P. R. N. M. Firm v Somasundaram Chetti & Co.

*Deed—Construction—Bill of sale—*Thavanai*—Meaning of—Credit period—Words—Interpretation—Technical meaning—Evidence of—Evidence Act Ss. 92 (5) and 98—Limitation for suit for money due—Limitation Act Art. 53.*

A vendor sent to his vendee a bill for some piece-goods purchased and at the top of the bill appeared the words " Debit interest at 3|4 per cent. per mensem after 60 days *thavanai.*" In a suit for the money due, the plea of limitation was set up and the question arose whether it was a credit sale or a cash transaction. *Held,* the word *thavanai* meant credit period and the suit was governed by Art. 53 of the Limitation Act.

Per Venkatasubba Rao, J.—The word *thavanai* has acquired various meanings in various lines of business. Under S. 98, Evidence Act, evidence can be given to show the meaning it bears in the particular mercantile transaction in which it was used. In such cases the duty of the Judge is to inform his mind not only by reference to dictionaries of good reputation but also by evidence of the meaning ordinarily given to it amongst those who use it. *Rayner* v. *Rayner,* (1904) 1 Ch. 176; *Holt and Co.* v. *Collyer,* 16 Ch. D. 718 referred to. Even if the meaning of the word is a fixed period, oral evidence can be given under proviso 5 to S. 92, Evidence Act, that by the usage of a particular trade, an incident not expressly mentioned in a contract is a term of that contract.

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*R. C. No. 10 of 1924. 11th September, 1924.

2. (1913) I L R 36 M 544 : 21 M L J 333 (F. B.)

3. (1916) I L R 41 B 300 at 308 (P. C.).

K. M. P. R. N. M. Firm v. Soma-sundaram Chetti & Co.

Per Jackson, J. :—*Thavanai* is a colourless expression meaning only "period." Any particular sense in which the word may have been used must be proved *aliunde.*

Case stated under S. 69 of the Presidency Small Cause Courts Act of 1882 by the Registrar, Court of Small Causes, in New Trial Application No. 115 of 1923 preferred against the decree in Suit No. 10565 of 1921.

S. Subramania Aiyar for *S. Rengaswami Aiyangar* for the plaintiff-petitioner.

K. Bhashyam Aiyangar and *T. K. Srinivasathathachariar* for respondents.

The Court delivered the following

JUDGMENTS :—*Venkatasubba Rao, J.* :—This is a reference under the Presidency Small Cause Courts Act made on a difference of opinion between the learned Chief Judge on the one hand and the 2nd and the 3rd Judges on the other. Venkata-subba Rao, J.

The suit is for the balance due for the price of piece-goods sold. The plaintiffs are a firm of traders carrying on business at Coral Merchant Street, Georgetown, Madras, and the defendants are also traders carrying on business in another portion of the City, Godown Street. The defendants have raised the plea that the suit is barred by limitation. The decision of this issue turns upon the question whether the sale was a credit sale as contended for by the plaintiffs or it was a cash transaction as alleged by the defendants.

The contract is not in writing and the parties have agreed that according to the usage of the trade, certain terms are implied in contracts of this description and that those terms are:—

(1) that the price charged is that payable on the expiry of 70 days from the date of sale ;

(2) that after that period the seller is entitled to charge interest on the price at 9 per cent. per annum ;

(3) that if the purchaser pays the price or any part of it within the said 70 days, he is entitled to a discount at 12 per cent. per annum on the amount actually paid for the unexpired portion of the 70 days from the date of payment.

So far there is no dispute. But the plaintiffs contend that the price is payable only on the expiry of the period mentioned, in other words, that the sale is for credit. The defendants urge that the price becomes payable on the date of the sale, in other words, that it is a cash transaction.

K. M. P. R. N. M. Firm v. Somasundaram Chetti & Co.
—
Venkatasubba Rao, J.

The learned Chief Judge (Trial Judge) on the evidence adduced as well as on his interpretation of Ex. A which is the bill sent by the plaintiffs to the defendants, came to the conclusion that the sale was for credit and applied Art. 53 of the Limitation Act. The witness examined for the plaintiff deposes "The agreement was that the defendant should have a credit period. Within that period of *thavanai* no demand could be made." Likewise, a defence witness also says: "It is intended that no suit can be instituted until the period of *thavanai* expires. I am not aware of any such suit being brought within the *thavanai* period." This witness, however, prevaricates and tries to go back upon the statement he has made. Whatever this may be, the Trial Judge is entitled to find the terms of the contract on the evidence and his finding on a question of fact is final.

But the Judge bases his decision to some extent also on the terms of the bill to which I have made reference. After the sale, the sellers sent Ex. A to the purchasers and at the top of it the following words appear:—"Debit to M. Somasundaram Chetty and Company, Godown Street (defendant) interest at 3/4 per cent. per mensem after 60 days *thavanai*." By common consent, 60 days means 70 days, and incidentally I may take this opportunity to observe that it reflects little credit on those engaged in piece-goods trade at Madras who legibly say that when they note down 60 days they always mean 70 days. This habit has grown through several decades into a vice and the sooner it is given up the better.

Now, returning to the bill, the learned Judges of the Small Cause Court have put to themselves the question: "What is the meaning of this word *thavanai*?" The trial Judge has held that it means "credit period." If he is correct, the sale is clearly a credit sale and the suit is within time. But the other two Judges are of the opinion that the word *thavanai* means "a fixed period or a stipulated space of time." According to them, the period is mentioned in the bill merely for the purpose of the calculation of interest. In their view, the object of fixing a period is to provide that interest shall be calculated only on the expiry of this stipulated space of time. Their explanation for the term relating to discount is, that it has the effect of inducing the purchaser to promptly pay up the amount. I think it is necessary to extract the following passage from the judgment of the learned Chief Judge:—"I need hardly say

K. M. P. R. N. M. Firm v. Somasundaram Chetti & Co.

Venkatasubba Rao, J.

that the particular meaning to be attached to a term of a contract is one which has to be decided with reference to the facts of each case and upon the evidence in this case which I have considered carefully I incline to the view that the *thavanai* period in this case was the period of credit given to the purchaser." The learned Judge was certainly entitled to find on the evidence that the word *thavanai* was used by the parties to the suit in the sense of a "credit period." If it has obtained a technical meaning and is used in that sense in a particular context, the document must be interpreted in the light of that meaning. That the word *thavanai* has acquired various meanings in various lines of business, admits of no doubt. It is sufficient to refer for this purpose to *Ponnuswami Chetty* v. *The Vellore Commercial Bank, Ltd.* (1), *Narayanan Chetty* v. *Suppiah Chetty* (2), *Muthiah Chettiar* v. *Ramanathan Chettiar* (3) and *Ramanathan Chetty* v. *Subramanian Chetty* (4). Oral evidence may be given under S. 98 of the Indian Evidence Act to show the meaning of technical, local and provincial expressions. Under this section, evidence of the meaning which words bear in mercantile transactions can be given. The dictionary meaning of the word *thavanai* is said to be "a term or a fixed term" but if the word has obtained a technical meaning in a particular trade or when used in a particular context, the Courts when construing that word are bound to take into account that meaning. The learned Chief Judge says that on the evidence he finds that the word *thavanai* is equivalent to a credit period, and speaking for myself with experience of such transactions extending over two decades, I am glad to find that the effect of the evidence as stated by the Chief Judge, confirms what I have always believed to be, the meaning of this word occurring in this context.

The 2nd and 3rd Judges were influenced by the observations of Mr. Justice Coutts-Trotter as he then was in a suit decided on the Original Side of the High Court. He said in that judgment "all that *thavanai* means so far as I can gather from the expert witnesses and from the dictionary that was produced is 'a fixed period or a stipulated space of time' so that the word 'credit' which appeared to me to be almost fatal to the defendants' case is not there at all." The learned Judge was not in that case called on to find what the technical meaning of the word *thavanai* was and for that purpose no witnesses

1. (1919) 38 M L J 70.
2. (1920) 38 M L J 437.
3. (1917) 7 L W 330.
4. (1915) 28 M L J 372.

K. M. P. R. N. M. Firm v. Somasundaram Chetti & Co.
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Venkatasubba Rao J.

were examined. He relied upon the dictionary meaning of the word and the testimony of an interpreter of the Court who of course gave a meaning to the word which he took from the dictionary. The case is not an authority in regard to the sense in which that word is used in the piece-goods trade as carried on in Godown Street. It is clear from the observations of all the three Judges that by usage certain terms are implied in transactions in piece-goods among Godown Street dealers and the learned Second Judge also adds that in Coral Merchant Street, business is now done in conformity with the Godown Street usage.

In *Rayner* v. *Rayner* (5) Vaughan Williams, L. J. says that the meaning of a word is relative to the circumstances and occasion and date on which the word is used and that it is the duty of the Judge to inform his mind not only by reference to dictionaries of good reputation but also by evidence of the meaning ordinarily given to it amongst those who use it. In *Holt and Company* v. *Collyer* (6) Fry, J. observes "that before evidence can be given of the secondary meaning of a word the Court must be satisfied from the instrument itself or from the circumstances of the case that the word ought to be construed not in its popular or primary signification but according to its secondary intention." In that case a person who had entered into a covenant not to use a house as a beer-house, opened a grocer's shop there at which he carried on the sale of beer to be drunk off the premises, as ancillary to his grocer's business. Evidence to show that the word beer-house was understood in the trade in a technical sense was rejected. The reason is stated by Fry, J., the lease was an ordinary lease by a landlord, who was not shown to be a brewer or connected with the brewing trade, to a person who was not in any way engaged in the business of selling beer. In these circumstances if there be a technical signification to that word in the brewing trade there was no reason to suppose the parties who were not connected with that trade so used it and on that ground the evidence offered was rejected. The present case is very different. The word *thavanai* has been used by traders in piece-goods in a document relating to that trade and there can be no doubt that evidence can be given to show that the word is used in a particular sense. This again is a question of fact and the learned Trial Judge is entitled to find the meaning of the word as used in the document.

5. (1904) 1 Ch 176, 6. 16 Ch. D 718.

K. M. P. R N. M. Firm v. Somasundaram Chetti & Co.

Venkatasubba Rao, J.

Supposing the word as used in the document really means a fixed period or a stipulated space of time, the defendants can find no argument on that. If that is the meaning of the word, the " sale " may be either a cash or a credit sale, and even assuming for a moment that Ex. A is the contract which it is not, oral evidence can be given under proviso 5 of S. 92 to show that by the usage of the trade an incident not expressly mentioned in the contract (here that the sale is on credit) is a term of that contract. The learned Trial Judge is even then justified in finding that the sale is a credit sale. I answer the question submitted to us by the Small Cause Court by saying that the view taken by the learned Trial Judge is right.

Jackson, J.

Jackson, J.:—This reference has been made by three Judges of the Presidency Small Cause Court under S. 69 of the Act.

They state that the question of law on which they differ is whether the cause of action in a certain suit dates from a sale (in which case the suit would admittedly be time barred) or whether it dates from the expiry of 70 days allowed for credit after the date of the sale (in which case the suit would not be time barred). This is a question of fact rather than of law; and the reference has really been made because the learned Judges have differed in construing a document which in their opinion affects the merits of the case. This document Ex. A is correctly described by them as being a bill, which contains a bill head to this effect, " Interest at 3|4 per cent. per mensem after 60 days period (*thavanai*) ". The mere construction of this bill presents no difficulty. Its heading is an announcement to the effect that after 60 days interest will be charged. But at the end of their reference the learned Judges speak of this bill heading as if it were the suit contract. The bill is not a contract and its wording does not import a period of credit for the payment of the price. *"Thavanai"* is a colourless expression meaning only " period." In itself it has no more significance than the Latin word " per " It does not in itself convey the idea of credit. I agree with my learned brother that any particular sense in which the word may have been used must be proved *ali unde*. I would answer the reference of the Small Cause Court in the above terms.

T. S. V. *Reference answered.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD DUNEDIN, LORD CARSON AND SIR JOHN EDGE.

Cowasji Edalji Dadachanji ... *Appellant**

v.

Ratanbai and another ... *Respondents.*

P. C.

Cowasji Edalji Dadachanji *v.* Ratanbai.

Will—Bequest of residuary estate to posthumous son—Indian Succession Act (X of 1865), S. 107—Whether such bequest vested or contingent.

Where the will of a Parsi testator contained the following disposition relative to a posthumous son—

"Should a son be born he also shall be cherished and maintained, and educated and brought up. And when he comes of age my executor or after his death his executors or executrices shall make over the whole of my remaining properties to the said son. Should the child (whether) daughter or son born of the womb of my wife die in tender age (*i. e.*, a minor) and should my wife for any reason whatever be unwilling to live as a member of the family with my executor, then my executor shall out of my property purchase Bonds for Rs 5,000 bearing interest at 4 per cent. at the market rate and shall transfer the same to the name of my said wife, Ratanbai."

Held, that the bequest to the son was "contingent" within the meaning of the initial clause of S. 107 of the Indian Succession Act (X of 1865) and not vested, and did not fall within the "Exception" appearing at the end of that section. *In re, Gossling,* L R (1902) 1 Ch. 945 : (1903) 1 Ch. 448 referred to.

Appeal from decree (2nd August, 1922) of the High Court (Appellate Jurisdiction), Shah, Ag. C. J. and Pratt, J., reversing a decree of Kanga, J., of the same Court (Original Jurisdiction), dated the 4th February, 1922, and made upon an Originating Summons taken out by the widow, Ratanbai, of the deceased testator, Rustomji Edalji Dadachanji, for the construction of his will, dated the 10th July, 1913. The appellant was the sole executor named in the said will.

W. H. Upjohn, K. C., Sir George Lowndes, K. C. and *E. B. Raikes* for appellant.

M. R. Jardine and *R. J. T. Gibson* for respondents.

28th October, 1924. The Judgment of the Board was delivered by

Lord Carson.

LORD CARSON :—The only question which this Board is asked to decide is whether upon the true construction of the

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*P C Appeal No. 148 of 1923. 28th October, 1924.

will, dated the 10th July, 1913, of a Parsi named Rustomji Edalji Dadachanji, who died on the 17th July, 1913, a bequest of the residuary estate in favour of his son since deceased was vested or contingent upon his attaining his majority.

The clauses of the will which are material for the determination of this question are in the words and figures following :—

"(5) My present surviving wife Ratanbai is now in the family way. And she has expressed in my presence her free will and accord to live as a member of the family with my executor (*i. e.*) my elder (or eldest) brother, Doctor Cowasji Edaljee Dadachanji. As to whatever children (*I* child) that may be born of her womb, my brother shall bring up and maintain the same. And my said executor shall defray all the expenses in connection therewith out of my property and effects. And he shall maintain the family. (The expression 'maintenance of the family' includes that of the maintenance of my said executor also). Should a daughter be born of the womb of my wife Ratanbai, she shall be brought up and maintained and shall be educated properly and my executor or after his death his executors or executrices shall after making outlays in accordance with my circumstances get her married at a proper place (*i. e.*, in a suitable family). Should a son be born he also shall be cherished and maintained, and educated and brought up. And when he comes of age my executor or after his death his executors or executrices shall make over the whole of my remaining properties to the said son. Should the child (whether) daughter or son born of the womb of my wife, die in tender age (*i. e.*, a minor) and should my wife for any reason whatever be unwilling to live as a member of the family with my executor, then my executor shall out of my property purchase Bonds for Rupees Five thousand bearing interest at 4 per cent. at the market rate and shall transfer the same to the name of my said wife Ratanbai.

"14. After having defrayed all the household expenses out of the income of my Punji (property), as to whatever there may remain over my executor shall, if he thinks proper, expend the same in giving encouragement to education and the works of science and arts as well as in erecting troughs for cows (and) cattle to drink water from. In case my executor should not do that then he has absolute authority to do so. If he likes he may make outlays in this manner or he may not even make the same.

"15. As to my property (or properties) and lands at Nasik and Kherwadi and as to my share in my paternal property and Punji situated at Navsari, I bequeath the same also to my executor my brother Dr. Cowasji Edalji Dadachanji. And I annul and cancel the right of my heirs from all those.

"16. My executor shall make use thereof as he may think proper. He is the owner of all those. As to the whole of the effects and furniture, chattels in my home, and the goods and property, whatever there may remain over after payment of the above Warsas, I bequeath the same to my said executors."

P. C.
Cowasji Edalji Dadachanji v. Ratanbai.
Lord Carson.

The parties are governed by the Indian Succession Act (X of 1865), the material section of which is in the following terms :—

"107. A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens........until the condition has been fulfilled, the interest of the legatee is called contingent.

* * * * * *

"*Exception*—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit ; the bequest of the fund is not contingent."

Both the Courts in India held that the bequest to the testator's son is contingent within the meaning of the first clause of S. 107, a decision with which their Lordships agree.

The main contention, however, before this Board on behalf of the contesting respondent was that the terms of the gift came within the exception contained in S. 107.

The Trial Judge held that the case did not fall within the exception to S. 107. The appellate Court, however, took a different view and held that by reason of the exception "the bequest in favour of the son was vested in interest at the date of the testator's death." It is necessary, therefore, to examine the clauses referred to in the will to see whether the fund is bequeathed to the son "upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age or directs the income, or so much of it as may be necessary to be applied for his benefit."

In the first place it is to be noticed that there is no direct gift to the son, but only a direction to hand over, not any particular fund, but the whole of the testator's remaining properties when the son comes of age. Nor is the income of such remaining properties to be employed in any way in accordance with the terms of the section absolutely for the son, nor is it directed that the income, or so much of it as may be necessary, should be applied for his benefit. That would be impossible, as the remaining properties are not in any way ascertained or ascertainable [see *In re, Gossling* (1)] and the same case reported on appeal in [*In re, Gossling* (2)].

As the learned Trial Judge states in his judgment in analysing the Will : "In this case the executor is directed

1. (1902) 1 Ch 945. 2. (1903) 1 Ch 448.

P. C.

Cowasji Edalji Dadachanji v. Ratanbai.

Lord Carson.

to maintain the family of the testator and the maintenance of the family includes the maintenance of the executor. The direction to the executor is that he should maintain himself, the testator's wife and the son or the daughter of the testator out of the properties and effects of the testator. The executor it seems may, for the purpose of maintenance of the testator's family, spend the corpus, for the maintenance of the family was to be out of the property and effects and not out of the income only of the property. If the maintenance of the family did not exhaust the whole income, a discretionary power was given to the executor by cl. 14 of the Will to spend the surplus income in giving encouragement to education and works in science and arts as well as in erecting troughs for cows and cattle to drink water from." There is, therefore, no definite ascertained interest "to arise from the fund."

Their Lordships agree with the Trial Judge that the case does not fall within the exception to S. 107 of the Indian Succession Act, and as has been already stated, their Lordships agree that the bequest of the residue to the son is contingent on his attaining the age of majority. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and the decree of the Trial Court restored. The order as to costs made by the High Court in appeal will stand.

The respondents will pay the costs of this appeal.

A. de M. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the Chief Court of Lower Burma.)

PRESENT :—LORD DUNEDIN, LORD CARSON AND SIR JOHN EDGE.

Maung Dwe and others *Appellants**

v.

Khoo Haung Shein and others *Respondents.*

P. C.

Maung Dwe v. Khoo Haung Shein.

Buddhist Law—Chinese—Inheritance—Right of step-children and step-grandchildren to the exclusion of collaterals—Conduct of parties.

Upon the death of a Chinese Buddhist, his or her step-children and step-grandchildren are entitled to inherit the property of the deceased to the exclusion of his or her collaterals.

Ma Gun Bon v. *Maung Po Kywe and others,* 2 U B R 66 approved and followed.

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*P C Appeal No. 84 of 1923. 21st October, 1924.

P. C.

Maung Dwe v. Khoo Haung Shein.

Conduct (e. g., residing separately from the step-parents or step-grand-parents, or not burying them) may operate as a disqualification of such right, but does not constitute a necessary qualification for its acquisition.

Maung Sein Thwe v. Ma Shwe Yi, 10 L B R 397 approved and followed.

Appeal from a judgment and decree (30th January, 1922, amended 15th May, 1922) of the Chief Court of Lower Burma, Appellate Side (Pratt and Duckworth, JJ.), reversing a judgment and decree (6th December, 1920) of Maung Hla, Esq., Additional District Judge, Tavoy.

The facts of the case sufficiently appear from the judgment of the Board.

E. A. Harvey, K. C. and *R. L. Parry* for appellants.

G. S. Saunders for respondents.

21st October, 1924. The Judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN :—This is the case of a disputed succession to the property of a lady named Ma Shwe Kin, a Chinese Buddhist living in Tavoy, who was the third wife and the widow of Khoo Shwe Goon. Khoo Shwe Goon was first married to Ma Lin and by her he had a son now deceased and another son Khoo Ping Hoe, one of the respondents in the appeal. Ma Lin died and Goon married Ma In, by whom he had a son Khoo Ping Kyan, now deceased. Khoo Ping Kyan married and had three sons and a daughter, who are the other respondents. Ma In died, and after some years Goon married his deceased wife's sister Ma Shwe Kin. Goon died in 1917 before his third wife, who died in 1919. He disposed of his own property by will.

Ma Shwe Kin died in 1919 possessed of considerable property, which was her own. She was also entitled to a share of the succession of her mother Pwa Zo. Ma Shwe Kin was survived by a brother and married sister. This brother, the sister and her husband are the appellants in the present case. Originally a question was raised as to whether Goon really ever married his third wife, but it was held in the Courts below that the marriage was sufficiently established by habit and repute and no question as to that was raised before their Lordships. The case, therefore, resolves itself into the question, who are to be preferred, the step-son and step-grandchildren on the one hand, or the lady's own brother and sister on the other ?

The case was tried before the District Judge, who preferred the appellants. That learned Judge took the view

P. C.

Maung Dwe v. Khoo Haung Shein.

Lord Dunedin.

that, though in the case of *Ma Gun Bon* v. *Maung Po Kywe and another* (1), the grandchildren, as descendants, were preferred to the collaterals, that case really turned, not upon the general principle, but upon the fact that the property there in question had come from the real father and gone to the second wife and thus only reverted to the original family. He also held that, in this case, the step-grandchildren had not lived with the deceased and had not buried her, that ceremony being performed by the brother and sister.

Appeal was taken to the Chief Court of Lower Burma, and the learned Judges in appeal reversed the judgment. They held that the case of *Ma Gun Bon* v. *Maung Po Kywe and another* (1) proceeded on general principles and not upon the special character of the property in question. They also held that the facts above narrated created no disqualification

Their Lordships have examined the Digest of Burmese Buddhist Law, which is the available source of reference to the rules of the Dhammathats. They also considered the authorities cited. The leading case on the subject is undoubtedly the case of *Ma Gun Bon* v. *Maung Po Kywe and another* (1). It is quite true that in that case the property in question had come from the husband to the wife and that it was that property that was the subject of the disputed succession, but the judgment in no way proceeds on that point. There is a large citation of texts as to step-children, and the learned Judge sums up the matter thus :—

"These texts go to show that step-children are regarded as heirs without limitation, except in the case of ancestral property, and even in that they are granted a share provided the step-parent has lived to have a vested interest in it, or to reach it according to the Burmese expression."

This is quite in accordance with certain citations which are to be found in the Dhammathats. Thus S. 6 (Manugye) :—

"There are four kinds of inheritance, namely, (1) that which is obtainable by children, grandchildren and great-grandchildren only ; (2) that which is obtainable by children and step-children."

and in S. 295 (Manugye),

"The father marries again and both father and step-mother die leaving no off-spring of the marriage.

"The rule of partition between the step-children and their step-mother's co-heirs is as follows :—

"The children shall receive the whole of their father's as well as their step-mother's animate and inanimate property. As regards the share of

1. 2 U B R 66.

P. C.

Maung Dwe v. Khoo Haung Shein.

Lord Dunedin.

inheritance to which the step-mother was entitled in her deceased parents' estate which still remains undivided, her step-children shall inherit one-half and her co-heirs the remaining half."

and Manu, to the same effect :—

"The children shall inherit the property owned by the father and step-mother jointly."

Once it is determined that step-children are descendants they necessarily oust collaterals, for by Buddhist Law the property never ascends as long as it can descend. The learned appeal Judge in this case says :—

"The point of view of the Buddhist Law is undoubtedly based on the community of interest between husband and wife. So strong is the bond between them that, in the absence of natural children the husband's or wife's children, as the case may be, rank as the children of the step-parent in the matter of inheritance to the exclusion of collateral blood relations."

Their Lordships agree with this statement.

There remains the question whether the appellants are disentitled to succeed, because, first, the respondents did not live with the deceased, and, second, that they did not bury her. The learned counsel for the appellants contended that these services, which he designated by the name of the filial bond, were a condition precedent to the allowance of a step-child's right. Their Lordships cannot accept this view. In the same paragraph, S. 6 of the Digest of Burmese Buddhist Law, heading 4 is :—

"That which should be withheld from children who failed in filial duty."

and this is explained thus :—

"Among laymen disobedient and idle sons cannot inherit their parents' estate."

Their Lordships think it clear that conduct can indeed operate as a disqualification of the right, but that it is in no sense a necessary qualification to obtain the right. They agree with what was said in the case of *Maung Sein Thwe* v. *Ma Shwe Yi* (2) :—

"We are not prepared to assent to the view that a man who has proved that he is an heir has further to prove that he has not broken off filial relations in such a case as this."

and again p. 396 :—

"Mere separate residence does not now-a-days and by itself prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights."

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2. 10 L B R 397.

P. C.

Maung Dwe v. Khon Haung Shein.

Lord. Dunedin.

Their Lordships, upon the whole matter, agree with what was said by the learned Judges of the Court of Appeal, that in this case there is no forfeiture. It would only be natural that the children, who are all minors, should live with their own mother, and for the same reason, they could not have been the conductors of the funeral ceremony.

As to the hereditary property to which the deceased became entitled in respect of her mother, but which was not as yet in her possession, the judgment is in accordance with the texts quoted.

In view of the fact that Buddhist Law is in many ways obscure and the judgments are few, their Lordships think that it is necessary to make two observations in case this judgment should be used for the purpose of upholding propositions which it does not contain. The step-son here has made common cause with the step-grandchildren and was content that they should share along with him. Their Lordships pronounce no opinion as to what would be the result in a contest between the step-son and the step-grandchildren ; but either or both are entitled to exclude the appellants. Further, though the whole theory of succession depends upon the strict Buddhist view that intestacy is compulsory, this has so far been impugned upon that a Chinese Buddhist is allowed to test ; which accounts in this case for Goon's will as to his own property.

Their Lordships will humbly advise His Majesty that the appeal shall be dismissed with costs.

Solicitors for appellants *Henry Hilbery and Son.*

Solicitor for respondents : *A. M. Bramall.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Lahore.)

PRESENT :—VISCOUNT CAVE, LORD CARSON, SIR JOHN EDGE AND MR. JUSTICE DUFF.

Sat Narain *Appellant**

v.

Behari Lal and others *Respondents.*

P. C.

Sat Narain v. Behari Lal.

Hindu Law—Joint and unpartitioned family immoveable property under Mitakshara system—Presidency Towns Insolvency Act (III of 1909), Ss. 2, 17

*P C Appeal No. 153 of 1923. 21st October, 1924.

P. C.

Sat Narain v. Behari Lal.

and 52—Order adjudicating a co-parcener insolvent—Co-parcener's son's right of pre-emption of his share and interest therein—Property of insolvent—Punjab Pre-emption Act, 1913—Civil Procedure Code, 1882, S. 266—Civil Procedure Code, 1908, S. 60—Property liable to attachment and sale under execution.

Where one of the co-parceners of a joint Hindu family, governed by the Mitakshara system of Hindu Law has been adjudicated an insolvent under the Presidency Towns Insolvency Act (III of 1909), such adjudication does not divest the co-parcener's son of his right and interest in the unpartitioned immoveable property of the family, or deprive him of his right of pre-emption therein under the Punjab Pre-emption Act, 1913.

Fakirchand v. *Hurruckchand,* I L R 7 Bom 438 ; *Girdhari Lall* v. *Kantoo Lall,* L R 1 I A 321 ; *Brij Narain* v *Mangala Prasad,* L R 51 I A 129 ; *Rangayya* v. *Thanikachalla,* I L R 19 M 74 ; *Nunna Brahmayya* v. *Chidaraboyina,* I L R 26 M 214 ; *Sanyasi Charan Mandal* v. *Asutosh Ghose,* I L R 42 Cal 225 ; and *Harmukh Rai* v. *Radha Mohan,* (1919) 54 P R 423 referred to.

Appeal from a judgment and decree (25th July, 1922) of the High Court of Judicature at Lahore (Broadway and Brasher, JJ.) reversing a judgment and decree (20th May, 1915) of C. L. Dundas, Esq., District Judge, Delhi (reported in I. L. R. 3 Lahore 329).

The facts of the case sufficiently appear from the judgment of the Board.

L. de Gruyther, K. C. and *B. Dube* for appellant.

The respondents were not represented.

21st October, 1924. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE :—This is an appeal by the plaintiff in the suit from a decree of the High Court at Lahore, which dismissed his suit. The suit was brought on the 17th March, 1915, by the plaintiff, then a minor, through his next friend, in the Court of the District Judge of Delhi for possession of a house in Delhi by pre-emption. The District Judge gave the plaintiff a decree, but the High Court in appeal dismissed the suit on the sole ground that his father had been adjudicated insolvent on the 27th September, 1913, under the Presidency Towns Insolvency Act, 1909, the High Court being of opinion that on that adjudication of insolvency the plaintiff had ceased to have a right to pre-empt the house in question.

The question on which this appeal depends is, what is the right or interest which an Official Assignee acquires under Act III of 1909, the Presidency Towns Insolvency Act, 1909, in the joint and unpartitioned immoveable property of a Hindu joint family governed by the Law of the Mitakshara on, and

P. C.

Sat Narain v. Behari Lal.

Sir John Edge.

solely by virtue of, an adjudication by a High Court that one of the co-parceners of the joint property is insolvent ? The question is one of importance and it depends on the true construction of the Presidency Towns Insolvency Act, 1909. In considering that question it has to be borne in mind that it is well-established law that in families governed by the law of the Mitakshara no co-parcener has in the joint family property any separate and defined share, although in Northern India at least a co-parcener of such joint family property has a right to obtain a partition and on such partition he will obtain a separated and defined share of the joint family property. A creditor of a co-parcener may, under certain circumstances, obtain a partition of his debtor's share in joint family property, and when in executing a decree a Court sells what is joint family property as the property of the judgment-debtor the purchaser at the Court-sale may under certain circumstances obtain a good title to what he purchases.

The facts of the present case are as follow :—Rai Bahadur Sri Kishen Das and his two sons, who were minors and the elder of whom is Sat Narain, the plaintiff, were Hindus governed by the law of the Mitakshara, and were possessed of joint family property as co-parceners. It is not suggested that the property was self-acquired property of Sri Kishen Das. Sri Kishen Das on behalf of himself and his two sons was the manager of the property. On the 27th September, 1913, Sri Kishen Das by an order of the High Court of Bombay was adjudicated insolvent and by S. 17 of the Presidency Towns Insolvency Act, 1909, his property vested in the Official Assignee and became divisible among his creditors. S. 52 of the Act defines the property of an insolvent which shall or shall not be divisible among his creditors thus :—

"52 (1). The property of the insolvent divisible amongst his creditors and in this Act referred to as the property of the insolvent, shall not comprise the following particulars, namely :—(*a*) property held by the insolvent on trust for any other person ; (*b*) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessel, and furniture of himself, his wife and children, to a value inclusive of tools and apparel and other necessaries as aforesaid not exceeding three hundred rupees the whole ;

(2) subject as aforesaid the property of the insolvent shall comprise the following particulars, namely :—(*a*) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge ; (*b*) the capacity to exercise and to take proceedings for exercising all such powers in or over or

P. C.

Sat Narain v. Behari Lal.

Sir John Edge.

in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge; and"

* * * * *

The power to obtain a partition of the joint family property was a power which the Official Assignee might have exercised under (*b*), but he has not exercised that power.

The definition section of the Act is so far as it is material in this case as follows :—

2. In this Act, unless there is anything repugnant in the subject or context,—

* * * *

(*e*) "property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit;

* * * *

The property of an insolvent which by S. 17 vests in the Official Assignee must mean only the property which by that section and S. 52 is divisible amongst his creditors.

On the 10th April, 1914, Lala Mannun Lal, the third defendant, sold the house in Delhi which the plaintiff seeks to pre-empt by this suit, to Behari Lal and Jamna Das, the first and second defendants. The house is urban immoveable property within the meaning of the Punjab Pre-emption Act, 1913, which the plaintiff was and is entitled to pre-empt by reason of that sale, unless he had lost that right by reason of the order of the 27th September, 1913, adjudging his father Sri Kishen Das an insolvent. The right to pre-empt is claimed by the plaintiff as a co-sharer, co-parcener, in an adjoining house, that adjoining house being "immoveable property contiguous to the property sold" within the meaning of S. 16 of the Punjab Pre-emption Act, 1913.

Lala Mannun Lal, the vendor of the house in question, did not defend the suit. The other two defendants Behari Lal and Jamna Das by their written statement raised this question, which has to be considered, thus :—

"These defendants admit that the plaintiff with his father R. B. Sri Kishen Das forms a joint Hindu family but deny that at the date of the sale of the house in suit or at the date of this suit the plaintiff had any proprietary right in the property through which he claims pre-emption. The real facts are that Rai Bhadur Sri Kishen Das, the father of the plaintiff, and the head and manager of his family, family estate and family firms as well as in his personal capacity was, in consequence of the failure of the family business,

P. C.

Sat Narain v Behari Lal

Sir John Edge.

adjudicated insolvent on 27th September, 1913, by the order of the High Court of Bombay, and on and from the said date the whole of the family estates and effects as well as the right, title and interest of the insolvent became vested in the Official Assignee of Bombay, who since then became the legal owner with powers of control and disposal and obtained possession of and over all the estate and properties including the house through which the plaintiff claims possession."

That means that when a Hindu, who happens with his sons to constitute a joint family subject to the law of the Mitakshara, is adjudged an insolvent under the Presidency Towns Insolvency Act, 1909, not only his own rights but all the rights and interests of his sons who are his co-parceners in joint family property vest in the Official Assignee by virtue of the adjudication alone. That is a startling proposition. It must depend on the wording of the Presidency Towns Insolvency Act, 1909, and the question is whether that could have been the intention of the Governor-General of India in Council when that Act was passed. It is quite clear that if this joint family could be treated as a firm carrying on its business in partnership an order adjudging the father who managed the business or even an order adjudging the firm insolvent could not be made under that Act even if the firm consisted solely of a Hindu father and his two minor sons, which would affect the interests of a minor who happened to be a partner in the firm.

The learned District Judge who tried this suit framed four issues. The first issue, which is the only material issue in this appeal, was as follows :—1. Does the adjudication of Rai Bahadur Lala Sri Kishen Das as an insolvent vest the interest of the present plaintiff in the proprietary house in the Official Assignee, and if so, does he (the plaintiff) cease to be an owner for the purposes of S.16 of the Punjab Pre-emption Act? On that issue several cases decided by Indian High Courts were cited on behalf of the answering defendants. The learned District Judge decided the first issue in favour of the plaintiff, and on the 30th May, 1915, gave him a decree for pre-emption.

From that decree the defendants 2 and 3 appealed to the Chief Court at Lahore.. The appeal came on for hearing before Shadi Lal and Wilberforce, JJ. of the High Court, and these learned Judges after considering the authorities cited in argument before them stated that as far as the insolvency proceedings were concerned they were inclined to take the view of the Calcutta High Court in *Sanyasi Charan Mandal* v. *Asutosh*

P. C.

Sat Narain. v. Behari Lal.

Sir John Edge.

Ghose (1), although they observe that that case was not directly relevent, and were inclined not to follow the decision of the Division Bench of the Chief Court at Lahore in *Harmukh Rai-Munna Lal* v. *Radha Mohan* (2) and they referred to the Full Bench of the High Court the question—Does an order of adjudication (as an insolvent) passed against a father vest in the Official Receiver (Assignee) his son's interest in the joint family property ?

The question so referred came before a Full Bench consisting of Sir Shadi Lal, C. J. and Sir William Chevis and Abdul Raoof, JJ., Judges of the High Court.

The answer of the Full Bench to the question referred was given by Sir Shadi Lal, with whose opinion the other two Judges concurred. The concluding part of his opinion is thus stated:—

"The result of the above survey of the judicial decisions is decidedly in favour of the contention urged on behalf of the Official Assignee, but I must say that if the matter were *res integra,* I should find considerable difficulty in subscribing to the doctrine that the son's interest in the joint family property should, in the event of the father's insolvency, be regarded as the latter's property which vests in the Official Receiver. Upon general principles of the Hindu Law governing the rights of the father and his son in the co-parcenary property I should be inclined to hold that an order of adjudication against the father has only the effect of replacing the father by the Official Receiver, and that the order does not by itself vest in the latter the interest of the son in the property. As the son's share is in certain cases liable for the debts of the father, the Official Receiver may be able to enforce that liability provided that he takes appropriate proceedings for the purpose and satisfies the conditions which alone render the son's interest liable for the father's debts.

It has, however, been repeatedly held, vide *inter alia, Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas and another* (3) and the Privy Council decision cited therein, that the joint family property can be attached and sold in execution of a decree for money passed against the father and that the sale affects the interest of the son as well as that of the father, and in principle I see no real difference between an individual creditor realizing his debt from the co-parcenary property and an Official Assignee who represents the general body of the creditors, seizing it for the satisfaction of their debts. It is to be observed that S. 266 of the Civil Procedure Code of 1882, which enumerates the various kinds of property of a judgment-debtor, which are liable to be attached and sold in execution of a decree for money as well as S. 60 of the Code of 1908, which has replaced that section mentions, *inter alia,* the property over which or the profits of which a judgment-debtor 'has a disposing power which he may exercise for his own benefit.' And as pointed out already, this is exactly the phraseology which has been used in the Insolvency Act, and it would be most undesirable taht the same expression used in two enactments dealing with the rights of the creditors should receive two different interpretations.

1. (1914) I L R 42 C 225. 2. (1919) 54 P R 423.
3. (1886) I L R 11 B 37.

Having regard to these considerations and to the judgments which are directly in point, I would answer the question referred to the Full Bench in the affirmative. The son, no doubt, has his remedy, but as pointed out in *Fakirchand Motichand* v. *Hurruckchand* (4), he has to establish the circumstances which would show that his share is not liable for the debts of his father."

Their Lordships are of opinion that the question to be decided in this appeal must be decided on the wording of the Presidency Towns Insolvency Act, 1909, and on that Act alone. Cases which have arisen under S. 266 of the Code of Civil Procedure, 1882, or under S. 60 of the Code of Civil Procedure, 1908, depended on different considerations, and decisions in cases under those sections are likely to mislead a Court which has to construe the Presidency Towns Insolvency Act, 1909. A sale under S. 266 of the Code of Civil Procedure, 1882, or under S. 60 of the present Code is a sale by a Court in execution of a decree which until the contrary is shown can be executed against the property which has been attached. When the decree which was executed was made in a suit to which the sons were not parties and the property sold was the joint property of the father and the son, the sale was good on the principle of Hindu Law that it is the pious duty of a Hindu son to pay his father's debts unless it is shown that the debt in respect of which the decree was made was contracted by the father to the knowledge of the lender for the purposes of immorality. S. 266 of the Code of Civil Procedure is so far as it is necessary here to refer to it :—

"266. The following property is liable to attachment and sale in execution of a decree (namely), lands, houses, or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory-notes, Government securities, bonds or other securities for money, debts, shares in the capital or joint-stock of any railway, banking or other public Company or Corporation, and, except as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, and whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf."

Their Lordships do not intend to say one word which might have the effect of disturbing and raising doubts as to decisions under S. 266 of the Code of Civil Procedure, 1882, or under S. 60 of the present Code, but they must deal with the matter upon the words of the statute which has to be applied in this case.

Their Lordships will now briefly refer to the more important of the cases mentioned or referred to in the answer of the

4. (1883) I L R 7 B 438.

P. C.

Sat Narain v. Behari Lal.

Sir John Edge.

Full Bench to the question submitted to it, observing that none of the cases apparently required that the Presidency Towns Insolvency Act, 1909, should be construed.

In 1883 the case of *Fakirchand Motichand* v. *Hurruckchand* (4) came before a Judge of the High Court at Bombay sitting alone. In that case a vesting order had been made by the High Court under S.7 of the Indian Insolvency Act, 11&12 Vic. cap.21, vesting in an Official Assignee the real and personal estate of the Hindu father who with his son was a member of a joint family. It would appear that the father had carried on a separate business as a shroff and stopped payment and that it was in respect of a debt incurred by him in that business that the vesting order was made. After the death of the father the Official Assignee sold four houses which had been the joint property of the father and the son, and the son brought a suit for a declaration that he was entitled to a part of the four houses. Latham, J. held that as under the Mitakshara law a father has the right to dispose of his son's interest in ancestral immoveable estate for the payment of his own debts not contracted for immoral purposes, a vesting order made under S. 7 of that Act vested that right in the Official Assignee, who could therefore give a good and complete title to such ancestral estate to a purchaser. Latham, J., referred to *Girdhari Lall* v. *Kantoo Lall* (5) and quoted the ruling of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Prasad Singh* (6) for the proposition:

> "First, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for father's debts, his sons, by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the purchasers had notice that they were so contracted ; and, secondly, that the purchasers at the execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

[As to what is an antecedent debt in the case of a mortgage, see the most recent case of *Brij Narain* v. *Mangala Prasad and others* (7)]

Latham, J. in *Fakirchand Motichand* v. *Hurruckchand* (4) was putting his construction upon S. 7 of 11 and 12 Vic c. 21, which is as follows :—

4. (1883) I L R 7 B 438. 5. L R 1 I A 321. 6. L R 6 I A 88.
7. L R 51 I A 129.

"VII. And be it enacted, that upon the filing of any such petition as is aforesaid, it shall be lawful for the said Court and the said Court is hereby authorized and required to order that all the real and personal estate and effects of such petitioner, whether within the territories within the limits of the charter of the *East India* Company or without, except the wearing apparel, bedding, and other such necessaries of such petitioner and his family and the working tools and implements of such petitioner and his family, not exceeding in the whole the value of Company's Rupees Three hundred for each petitioner with his family, and all debts due to him and all future estate, right, title, interest, and trust of the said petitioner in or to any real or personal estate or effects within or without the said territories which such petitioner may purchase, or which may revert, descend, be devised or bequeathed or come to him, and all debts growing due to him before the Court shall have made its order in the nature of a certificate as hereinafter mentioned, do vest in the Official Assignee for the time being of the said Court, and that all books, papers, deeds, and writings in any way relating to such petitioner's estate and effects in his possession, or under his custody or control, shall be deposited with such Assignee, and such order shall be entered of Record in the said Court, and such notice thereof shall be published as the said Court shall direct ; and such order, when so made, shall by virtue of this Act relate back to and take effect from the filing of the said petition, and shall instantly, and without any conveyance or assignment, vest all the real and personal estate, effects and debts as aforesaid in the said Official Assignee, who shall have full powers for the recovery thereof, and shall hold and stand possessed of the same for the purposes and in manner hereinafter mentioned : Provided always, that in case, after making of any such vesting order, the petition of any such petitioner shall be dismissed by the said Court, such vesting order made in pursuance of such petition shall from and after such dismissal be null and void to all intents and purposes : provided also that in case any such vesting order as aforesaid shall become null and void by the dismissal of such petition, all acts theretofore done by any assignee or other person acting under his authority according to the provisions of this Act shall be good and valid, and no action or suit shall be commenced against any such assignee, nor against any person duly acting under his authority, except to recover any property of such petitioner detained after an order made by the said Court for the delivery thereof, and demand made thereupon ; and until the appointment of an Official Assignee as hereinafter is directed the common assignee of the Court shall stand and be in the place of the Official Assignee, and this present clause shall apply and have effect accordingly."

Section 30 of the 11 and 12 Vic. c. 21, was as follows :—

"XXX. And be it enacted, that all powers vested in any such insolvent which he might lawfully execute for his benefit shall be and are hereby vested in the assignee or assignees of the real and personal estate of such insolvent or insolvents by virtue of this Act, to be executed by his assignee or assignees for the benefit of his creditors."

If their Lordships had to construe S. 7 of the 11 and 12 Vic. c. 21, they would doubt that the Imperial Parliament sitting at Westminster in passing the 11 and 12 Vic. c. 21, ever contemplated or intended that " the Real and Personal Estate

P. C.
Sat Narain v. Behari Lal.
Sir John Edge.

of such Petitioner" which a Court might order to be vested in an Official Assignee, or a right to sell it for the debts of a Hindu father, might be held to include or should include the unpartitioned separate interest of a Hindu coparcener, who was not a petitioner, in the immoveable property of a joint family.

In *Rangayya Chetti* v. *Thanikachalla Mudali* (8) a vesting order was made under "Insolvent Act, S. 7" (? 11 and 12 Vic. c. 21, s. 7) against the managing member of a Hindu joint family who was adjudicated an insolvent. The joint family consisted of the managing member of the family who, was the insolvent, his sons and his brother. The Official Assignee conveyed a house which was part of the joint property of the family to a purchaser, who sued for possession. Subramania Aiyar, J. following the judgment of Latham, J. in *Fakirchand Motichand* v. *Hurruckchand* (4) which has been above referred to, held that the Official Assignee could convey the share of the sons in the joint property, but not the share of the brother, and in so holding called in aid in support of his finding S. 266 of the Code of Civil Procedure, 1882, and the decision in *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas* (3), of West and Birdwood, JJ. in reference to that section.

In *Nunna Brahmayya Setti* v. *Chidaraboyina Venkataswamy* (9) seven brothers who were of full age and a minor son of one of them were members of a joint Hindu family governed by the law of the Mitakshara, and carried on a business, which had previously been carried on for very many years by the joint family to which they belonged. The seven brothers applied under 11 and 12 Vic. c. 21, to be adjudged insolvents. The minor member of the family who was a son of one of the seven brothers was not a party to that application. The debts in the schedule to the application were all debts incurred in carrying on the family business. Upon that application a vesting order was made under S. 7 of the Act. The Official Assignee sold a portion of the property of the joint family to the plaintiffs. Subsequently to that sale a person, who was a defendant to the suit, obtained a money decree against the son, who had been a minor, and in execution of that decree the son's share in the land was sold and was purchased by the defendant. Thereupon

3. (1886) I L R 11 B 37.
4. (1883) I L R 7 B 438.
8. (1895) I L R 19 M 74.
9. (1902) I L R 26 M 214.

P. C.

Sat Narain v. Behari Lal.

Sir John Edge.

a suit was brought by the plaintiffs for a declaration that the purchase by the defendant was inoperative by reason of the prior sale to them by the Official Assignee. The suit came on appeal before Bhashyam Aiyangar and Moore JJ. who followed the decision of Latham, J. which has already been referred to. They referred to the decision of West and Birdwood, JJ., which has been also mentioned, and they relied in support of their judgment upon decisions under S. 266 of the Code of Civil Procedure, 1882. These learned Judges followed the ruling of Latham J., but they referred to an observation which had been made by him in the case which he had decided, " That it has been suggested that this right vests in the Official Assignee as being a 'power' within the meaning of S. 30. But I think it falls more appropriately within the words of S. 7, and that there is no occasion to resort to S. 30, which seems to apply to powers in the ordinary legal sense of the term, created by will or instrument *inter vivos,* " and they held that the power could be derived only under S. 30 and not under S. 7. The 11 and 12 Vic. c. 21 was repealed by the Presidency Towns Insolvency Act, 1909, so far as it had not been previously repeated.

In *Sanyasi Charan Mandal* v. *Asutosh Ghose* (1) the question related to the power of a Court under the Provincial Insolvency Act of 1907 to adjudicate an infant an insolvent. who was a Hindu and a member of a family which carried on what is described in the report as " a joint family ancestral business in rice and firewood " in the District of the 24 Parganas. It also related to the power of a Court to appoint a Receiver of the infant's property. It is not stated in the report of the case what was the school of Hindu Law which governed the family. The material facts appear to have been that one Bhuban Mohun Mandal, who had carried on the business, had five sons of whom the infant was one. The five sons are said in the report to have " inherited " the business. It does not appear in the report when Bhuban Mohun died. On the 19th February, 1912, creditors, whose firm name was *Kishenchand Kesharichand,* applied to the District Judge of the 24 Parganas to have all the partners in what may be described as the debtor firm adjudicated insolvents, and prayed for the appointment of a Receiver of all the properties of the partners in the business. At the time when the application was made to the Court one of the five sons, Sanyasi Charan Mandal, was

1. (1914) I L R 42 C 225.

P. C.
Sat Narain v. Behari Lal.
Sir John Edge.

a minor. The District Judge refused the application for the adjudication of the minor son, but granted it with regard to the four other sons and appointed a Receiver of all the business of the four sons who were of full age and of all the properties purchased after the death of Bhuban Mohun Mandal and of four-fifths only of the properties inherited by the brothers from their father. From that order the minor son and the creditors separately appealed to the High Court. The appeals were heard by Mookerjee and Beachcroft, JJ. who held that the minor being an infant under age could not be adjudicated insolvent and that his property and share in the business would not vest in a Receiver who might be appointed. Those learned Judges also held that under the law in India when a partner in a firm has become bankrupt (adjudicated insolvent) the partnership is not necessarily dissolved except by an order of a Court made in a suit by a partner who has not been adjudicated insolvent, and added

"Consequently, in this country (India), when a person has been adjudicated an insolvent, the partnership is not necessarily dissolved, and the Receiver, who is appointed under S. 16 of the Provincial Insolvency Act, merely replaces the insolvent partner in respect of the business of the firm, that is, the Receiver and the partners who have not been adjudicated insolvents continue to constitute the firm. It may possibly be open to the Receiver to take steps for the dissolution of the partnership, but he cannot claim, as Receiver in insolvency, to take exclusive possession of the assets of the firm, including, in this case, the interest of the infant who has not been adjudicated an insolvent........But whatever remedies may be available hereafter to the Receiver or to the creditor, it is clear that the properties of the infant cannot be dealt with by either of them in these proceedings."

It does not appear from the report of the case whether any of the debts in respect of which the proceedings in insolvency were taken had been incurred when Bhuban Mohan Mandal was carrying on the business, but Sir Shadi Lal, C. J., in his judgment on the question submitted to the Full Bench, with which the other learned Judges concurred, referred to the decision of the Calcutta High Court in *Sanyasi Charan Mandal* v. *Asutosh Ghose* (1) although he considered it not directly relevant to the question before the Full Bench.

The only other case to which their Lordships think it is necessary to refer is that of *Harmukh Rai-Munna Lal* v. *Radha Mohan* (2); it was relied upon in the answer of the Full Bench

1. (1914) I L R 42 C 225.
2. (1919) 54 P R 423.

P. C.
Sat Narain
v.
Behari Lal.
Sir
John Edge.

in this case. In that case one Jai Narain and his son Banwari Lal, a minor, constituted a joint Hindu family, governed by the law of the Mitakshara, and carried on business as a firm under the name of Rama Nand-Jai Narain. Jai Narain was adjudicated insolvent on 21st August, 1912, under the Provincial Insolvency Act, III of 1907. His son, Banwari Lal, was not adjudicated an insolvent. Their Lordships are unable from the report to state the facts of the case with any accuracy, but it appears that in execution of a decree against Jai Narain and Banwari Lal a cotton press belonging to them was sold on 7th October, 1912, and Rs. 5,000 was realised by the sale. It also appears that a firm of Harmukh Rai-Munna Lal obtained an *ex parte* decree against Jai Narain and Banwari Lal, and that Banwari Lal made an unsuccessful application to set aside that decree on the ground that he was a minor. Harmukh Rai-Munna Lal applied for on the 28th November, 1912, and obtained a *pro-rata* share amounting to Rs. 2,382-15-9 of the Rs. 5,000 which had been realised by the sale of the 7th October, 1912. It also appears that the Receiver in the adjudication against Jai Narain brought a suit against Harmukh Rai-Munna Lal to recover the Rs. 2,382-15-9 and that it was held by Broadway and Abdul Raoof, JJ., that the Receiver was entitled to recover the Rs. 2,382-15-9 on the ground that it was the duty of Banwari Lal to pay the debts of his father Jai Narain. These learned Judges appear to have relied for that decision on the judgment of Latham, J., in the case reported in *Fakirchand Motichand* v. *Motichand Hurruckchand* (4) which they considered was followed by Subramania Aiyar, J. in the case reported in *Rangayya Chetti* v. *Thanikachalla Mudali* (8) and by Bhashyam Aiyangar and Moore, JJ. in the case reported in *Nunna Brahmayya Setti* v. *Chidaraboyina Venkataswamy* (9).

No one has appeared for respondents and consequently this appeal has been argued *ex parte*. Their Lordships have carefully considered the Presidency Towns Insolvency Act, 1909, and will now express the conclusions at which they have arrived.

In their Lordships' opinion the question referred to the Full Bench of the High Court should have been answered in the negative. It is true that S. 17 of the Act of 1909 provides

4. (1883) I L R 7 B 438. 8. (1895) I L R 19 M 74.
9. (1902) I L R 26 M 214.

P. C.

Sat Narain v Behari Lal.

Sir John Edge.

that on the making of an order of adjudication "the property of the insolvent" shall vest in the Official Assignee and shall become divisible among his creditors, and that by S.2 "property" is defined as including any property over which any person has a disposing power which he may exercise for his own benefit; and it may be said that a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts is such a power. But the definitions in S. 2 are only to apply "unless there is something repugnant in the subject or context"; and it is necessary therefore to consider the effect of the definition of "property" contained in that section in relation to the subject-matter which is being dealt with and the other sections of the Act. Now, as to the subject-matter—namely, the joint property of an undivided Hindu family—it is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors. The father's power to dispose of the joint property is not absolute, but conditional on his having debts which are liable to be satisfied out of that property; and S. 2 seems to contemplate an absolute and unconditional power of disposal. And if the later sections of the Act are examined, it becomes apparent that this cannot have been the intention of the statute. S. 52 provides that the property of the insolvent divisible among his creditors shall comprise "the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit," and it is difficult to reconcile this provision with the proposition that the property itself vests in the Assignee. S. 23 provides that when an adjudication is annulled the property of the debtor shall (subject to any direction of the Court) revert to the debtor to the extent of his right or interest therein; but this section contains no provision for the reverter of property over which the debtor had a disposing power only to the persons who were entitled to it subject to that power. S. 76, which enacts that the insolvent shall be entitled to any surplus remaining after payment in full of his creditors, is equally silent as to the destination of surplus property in which others had an interest. Having regard to these considerations and to the scope of the Act, their Lord-

P. C.
Sat Narain
v.
Behari Lal.
Sir
John Edge.

ships are satisfied that it was not the intention of the Act that on the insolvency of a father the joint property of his family should at once vest in the Assignee. It may be that under the provisions of S. 52 or in some other way that property may in a proper case be made available for payment of the father's just debts ; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the Assignee, and no such provision should be read into the Act.

As to the authorities cited, it does not appear to their Lordships that they are inconsistent with the above conclusion. The cases of *Fakirchand Motichand* v. *Motichand Hurruckchand* (4), *Rangayya Chetti* v. *Thanikachalla Mudali* (8), and *Nunna Brahmayya Setti* v. *Chidaraboyina Venkataswamy* (9) were decided under a different statute. *Sanyasi Charan Mandal* v. *Asutosh Ghose* (1) and *Harmukh Rai Munna Lal* v. *Radha Mohan* (2) were partnership cases and are not directly in point.

For the reasons above given, their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the High Court should be set aside with costs and the decree of the District Judge should be affirmed, except that the date for the payment of the Rs. 11,500 less the costs of the plaintiff-appellant incurred by him on the appeal to the Court below and his costs of this appeal should be extended to six months from the date of the receipt in the High Court of the Order in Council.

A. de M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE JACKSON.

N. Gangulu Naidu ... *Appellant** (*Respondent in S. A. No.* 955 *of* 1921 *on the file of the High Court*)

v.

Namineni Chengama Naidu and another ... *Respondents* (*Appellants in do.*).

Gangulu
Naidu
v.
Chengama
Naidu.

Partnership action—Parties—Rule—Exception—Decree in favour of plaintiff in partnership action—Appeal by defendants against—Death of one of them pend-

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* L P Appeal No. 6 of 1924. 17th September, 1924.

1. (1914) I L R 42 C 225. 2. (1919) 54 P R 423.

4. (1883) I L R 7 B 438. 8. (1895) I L R 19 M 74.

9. (1902) I L R 26 M 214.

Gangulu Naidu v. Chengama Naidu.

ing, and abatement of appeal as regards him—Dismissal of appeal as regards others also on ground of—When justified.

The plaintiff sued the defendants, who were four in number, alleging that he entered into a partnership with them, that he contributed towards capital Rs. 1,745, that the defendants by suppression of the accounts of the firm and otherwise were causing loss to him, and on these grounds he asked for a decree dissolving the partnership and directing the defendants to pay him the amount due inclusive of interest and profits.

The Sub-Judge found that substantially the case of the plaintiff was true and that the defendants fraudulently withheld the account-books. In the result he gave the plaintiff a decree for Rs 1,745 and profits amounting to Rs. 1,100. The sum of Rs. 1,100 was decreed as profits on the ground that, as the defendants had suppressed the account-books, every presumption should be made against them and the plaintiff's figure must be accepted.

From the decree of the Sub-Judge the first three defendants preferred an appeal to the District Judge, contending that there was no partnership at all and that the plaintiff was in possession of the account-books and was responsible for their suppression. There was no contest between the defendants *inter se* as to the measure of the liability of each one of them, and they were prepared to pay jointly the amount likely to be decreed by the Appellate Court.

Pending the appeal, the 3rd defendant died, and, as his legal representative was not brought on record within the prescribed period, the appeal abated so far as he was concerned. Thereupon the Dt. Judge dismissed the appeal as regards defendants 2 and 3 also on the ground that all the partners were necessary parties to a partnership action and that the appeal in the absence of the legal representative of the 3rd defendant was incompetent.

Held, reversing the District Judge, that the rule that a plaintiff in a partnership action was liable to have his suit dismissed if he did not make all the partners parties to his suit was inapplicable to the case before him and that he ought not to have dismissed the appeal as regards defendants 1 and 2 also.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Charles Gordon Spencer, Officiating Chief Justice, in S. A. No. 955 of 1921, preferred against the decree of the District Court, Chittoor, in A. S. No. 61 of 1919 (O. S. No. 48 of 1917, Sub-Court, North Arcot).

A. Krishnaswami Aiyar and *B. Somayya* for appellant.

L. A. Govindaraghava Aiyar and *L. S. Viraraghava Aiyar* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS :—*Venkatasubba Rao, J.* :—This is a Letters Patent appeal from the decision of the Officiating Chief Justice. The facts that have led to this appeal may be briefly stated. The plaintiff sued the defendants, who are four in number, alleging that he entered into a partnership with them, that he contributed towards capital Rs. 1,745, that the defendants by suppression of the accounts of the firm and otherwise were

Gangulu Naidu v. Chengama Naidu.

Venkatasubba Rao, J.

causing loss to him, and on these grounds he asked for a decree dissolving the partnership and directing the defendants to pay him the amount due inclusive of interest and profits.

Defendants 1 to 3, while admitting that they entered into the partnership, pleaded that as the plaintiff had made default in the payment of the capital agreed to be contributed, the partnership was dissolved within a few months of its formation, that the accounts were settled, that the amount due to the plaintiff was paid up and that the account-books of the dissolved partnership were taken by the plaintiff. The written statement of the 4th defendant is not before us, but it would appear that he did not admit that the plaintiff contributed Rs. 1,745 as capital, but he had no objection to have accounts taken and his share of the profits paid over to him.

The learned Subordinate Judge found that substantially the case of the plaintiff was true, that the defendants fraudulently withheld the account-books, and in the result he gave the plaintiff a decree for Rs. 1,745 and profits amounting to Rs. 1,100. The plaintiff claimed in the plaint the said amount as profits, and on the ground that every presumption should be drawn against parties suppressing the account-books, the Subordinate Judge accepted the figure mentioned by the plaintiff as the profits due to him and directed that amount to be paid.

From the decree of the Subordinate Judge the first three defendants preferred an appeal to the District Judge. The 3rd appellant (3rd defendant) subsequently died and his legal representative was not brought on the record within the prescribed period. The appeal abated so far as the deceased appellant was concerned under O. 22, R. 3, Civil Procedure Code, and the respondent applied to the District Judge for the dismissal of the appeal on the ground that all the partners were necessary parties to a partnership action and that the appeal in the absence of the legal representative of the 3rd appellant was incompetent. The District Judge on the strength of *Raj Chunder Sen* v. *Ganga Das Seal* and *Ramgati Dhur* v. *Raj Chunder Sen* (1) dismissed the appeal. It may be observed in this connection that the 4th defendant was not even at the outset made a party to the appeal, but this defect was not made a ground of the application to dismiss the appeal.

1. (1904) I L R 31 C 487 (P C).

Gangulu Naidu v. Chengamma Naidu.

Venkatasubba Rao, J.

A second appeal was filed to this Court by defendants 1 and 2 from this order of dismissal. Spencer, O. C. J., holding that *Raj Chunder Sen* v *Ganga Das Seal* and *Ramgati Dhur* v. *Raj Chunder Sen* (1) did not apply to the facts of this case, reversed the decision of the District Judge and remanded the appeal to the lower appellate Court for disposal on the merits.

I am of the opinion that the decision of the learned Officiating Chief Justice is right. It is undoubtedly true that ordinarily, to a partnership action, all the partners must be made parties, for an account cannot be taken in the absence of any partner. Let me take an example. *A* sues *B, C* and *D* for an account of a dissolved partnership. *A* claims Rs. 500 as the amount payable to him. If a partnership account is taken, it may be found that *D* owes the partnership Rs. 2,000 out of which *C* is entitled to Rs. 1,000, *B* to Rs. 500 and *A* to Rs. 500.

Take another instance. *A* claims Rs. 500. The accounts may disclose that *B* and *C* owe the partnership each Rs. 1,000, Rs. 1,500 is due to *D* and Rs. 500 to *A*. These illustrations show that it is ordinarily impossible to take an account of a dissolved partnership in the absence of any one of the partners. The Courts have therefore invariably held that a plaintiff in a partnership action is liable to have his suit dismissed if he does not make all the partners parties to his suit.

In the present case, however, the facts are somewhat different. The Subordinate Judge has given a decree for a lump sum, being of the opinion, that accounts cannot be taken in the normal way in the absence of account-books. Whether the Judge was justified in giving the plaintiff a decree for the whole amount of profits claimed, is not a matter with which we are now concerned. It is no doubt true that his finding in effect involves taking of an account. As Mr. A. Krishnaswami Aiyar, the vakil for the plaintiff put it, the decree of the Subordinate Judge is the result of a notional taking of an account though there may be no actual taking of an account. This, I am prepared to accept ; but still is the presence of all the parties necessary ?

Firstly, defendants 1 and 2, who were the appellants before the District Judge, contend that there was no partnership at all. In deciding this issue, the Court is not hampered by the absence of any of the parties. The case of those defendants is that there is no partnership to be dissolved and the

1. (1904) I L R 31 C 487 (P C).

rule that requires that all the partners must be made parties to a partnership action cannot apply to a case like the present where the appellants deny the existence of the partnership.

Secondly, the three defendants who originally filed the appeal put forward a common case, were represented by a single pleader and preferred a joint appeal. They made common cause against the plaintiff and there was no dispute on any point among themselves. They urged that the plaintiff was in possession of the account-books and was responsible for their suppression. If in appeal this contention is accepted and the plaintiff is found to be in possession of the books, he being unable to produce them, (he asserts he has not got them), the appeal will be allowed and the plaintiff's suit will be dismissed. In this event again, the absence of any particular party is not fatal to the appeal. Under O. 41, R. 4, Civil Procedure Code, the decree then may be reversed not only in favour of the defendants who are before the Court, but of all the defendants. It makes no difference that the other defendants are not parties to the appeal.

Thirdly, if it is found in appeal that the defendants suppressed the account-books, two alternatives are possible : either the decree of the Subordinate Judge may be affirmed or the Appellate Court may direct an account to be taken on a different footing, different from the one adopted by the Subordinate Judge. If the decree of the Subordinate Judge is affirmed, then again the absent defendants will be bound by the result, and the fact that they are not represented in appeal causes no inconvenience. If any different basis is adopted by the Appellate Court for taking the account, even in that case, no dispute at any time having existed between the three defendants, the absence of one of them in the appeal does not stand in the way of the rights of the parties being determined. Whatever may be the amount decreed by the Appellate Court the three defendants were prepared to pay it jointly, and it must be noted that the decree of the Appellate Court cannot be for an amount larger than what was allowed by the Sub-Court. If the decree of the Appellate Court to any extent modifies the Sub-Court's decree in favour of the defendants, it may enure for the benefit of all of them ; but as between the three defendants the Court is not called on to decide the measure of the liability of each one of them and determine their rights *inter se*. And the learned Vakil for defendants 1 and 2 has clearly stated to

Gangulu Naidu v. Chengama Naidu. — Venkatasubba Rao, J.

us (if any such assurance is necessary) that his clients do not propose to raise any question of this kind. In this view also, the absence of the 3rd defendant's representative is not fatal to the appeal.

Raj Chunder Sen v. *Ganga Das Seal* and *Ramgati Dhur* v. *Raj Chunder Sen* (1) is therefore clearly distinguishable and does not apply.

As stated at the very outset, there is no indication that an objection was taken by the plaintiff to the appeal being defectively constituted on account of the absence on the record of the 4th defendant. This is possibly due to the fact that the plaintiff realised that under O. 41, R. 20, Civil Procedure Code, it was open to the Court to direct the 4th defendant to be made a party. But, however, it is unnecessary to consider this point as I find that it was not raised before the District Court.

In the result, the judgment of the Officiating Chief Justice is confirmed and the Letters Patent Appeal is dismissed with costs.

Jackson, J.—I agree.

A. S. V. —— *L. P. Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Nagappa Pillai *Petitioner* (Plaintiff)*

v.

Arunachalam Chetty *Respondent (Defendant).*

Nagappa Pillai v. Arunachalam Chetty.

Chit fund—If a lottery—Discontinuance in the middle—Subscriber if entitled to sue for refund of subscriptions paid—Severance of legal from illegal part—Contract Act, S. 65—Applicability—Small cause revision case—Difference in opinion among Judges constituting Bench—Civil Procedure Code, S. 98—Letters Patent, cl. 36—Which applies.

The defendant was carrying on a chit fund. There were 500 subscribers each paying one rupee per month. The chit was to go on for 50 months and every month two prizes of Rs. 25 each were to be drawn by lot ; any subscriber who happened to win a prize would get Rs. 25 at once and had to pay thereafter only 8 as. a month, while if he won a second prize he would be given another Rs. 25 and thereafter his subscriptions would cease and his name would no longer be included in drawing the prize. At the end of 50 months all subscribers who had won no prize would be paid back the whole of the money they had subscribed. *Held,* the arrangement was clearly a lottery.

Where the stakeholder discontinued the chit after 27 months and thereupon a subscriber sued him for refund of the subscriptions he had paid, *held, per* Krishnan, J. (Odgers, J. holding *contra*) the main point was to pay back the

*C R P No. 243 of 1922. 25th March, 1924.

1. (1904) I L R 31 C 487 (P C).

Nagappa Pillai v. Arunachalam Chetty.

total amount of subscriptions paid while the arrangement to give prizes was only a collateral one serving as an inducement to join the chit and hence the former was severable from the latter and the illegality of the latter did not necessarily attach to the former. The suit for refund was therefore maintainable. *Sankunni* v. *Ikkora Kirtti,* (1919) M W N 570 not followed.

Per Odgers, J. :—As a material part of the illegal purpose had been carried out, the subscriber was not entitled to recover the amounts paid, as both the plaintiff and defendant were in *pari delicto* and there was no ground for holding they were not *potir est conditio possidentis.* Nor is the case to which S. 65 Contract Act, would apply as the contract was illegal from the beginning.

Held also, per curiam .—Where a High Court acts in revision under S. 25 of the Provincial Small Cause Courts Act, and the Judges constituting the Bench differ in opinion, S. 98, Civil Procedure Code, does not apply but under cl. 36 of the Letters Patent the opinion of the Senior Judge would prevail. Case-law reviewed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Devakotta in S. C. S. No. 561 of 1921.

K. S. Narayana Aiyangar and *Sivaramakrishna Aiyar* for *M. Subbaraya Aiyar* for petitioner.

P. C. Sundaram Aiyangar for respondent.

The Court delivered the following

JUDGMENTS :—*Krishnan, J.* :—This Civil Revision Petition has been referred to a Bench by Coleridge, J. as he considered that the ruling of Phillips, J., in *Sankunni* v. *Ikkora Kirtti* (1) on which the judgment of the District Munsif is based required re-consideration. Krishnan, J.

The suit refers to a chit fund carried on by the defendant. There were 500 subscribers each paying a rupee a month. The chit was to last for 50 months during which period two prizes were to be drawn by lot of Rs. 25 each among the subscribers every month. Any subscriber who happened to win a prize was paid Rs. 25 at once and was thereafter to pay only a subscription of eight annas a month. If he won a second prize he would be paid Rs. 25 more and his subscription ceased and his name would no longer be included in drawing the prizes. At the end of the 50th month all the subscribers who had won no prizes were to be paid back the whole of the money they subscribed, namely Rs. 50 each ; the single prize winners were similarly to be repaid Rs. 25 each. These are the rules under which the chit was carried on. There were certain other rules regarding defaulting subscribers, but it is not necessary now to refer to them.

1. (1919) M W N 570.

Nagappa Pillai v. Arunachalam Chetty.

Krishnan, J.

It will thus be seen that while the subscribers do not lose any part of the subscriptions they pay they get a chance of winning one or two prizes. That chance was decided by lot. But the prizes did not come out of the subscription paid as the total amount had to be repaid to the subscribers after the 50th month. The prize money was apparently obtained from the interest that the defendant could realise by himself investing the subscription moneys received by him for the 50 months, during that period.

There can be no doubt that so far as the arrangement regarding the giving of prizes is concerned it is clearly a lottery; and any suit brought, for example, to recover the prize money will fail as being one to enforce an illegal contract. S. 294 A of the Indian Penal Code makes a lottery an illegal transaction. The present suit however is not for such a purpose but for the refund of the subscriptions paid as the chit has been discontinued by the defendant. The question we have to decide is whether the illegality of the prize arrangement attaches itself to the contract to repay in a lump sum at the end of the 50 months the total subscriptions collected for those 50 months and prevents the plaintiff's present claim from being recognised and enforced.

It seems to me that the main contract between the parties were to pay back the total sum of the subscriptions collected intact in a lump sum at the end of the period. As an inducement to join the chit the prize arrangement has been added on to it as a collateral arrangement to the main contract. It is a collateral and ancillary advantage that a fortunate subscriber may get if he wins a prize. I am inclined to think that the contract to repay the subscriptions at the end of the period is severable from the arrangement to give prizes and the illegality of the latter does not necessarily attach to the former. The arrangement amounts to this that in lieu of interest on his money the subscribers accept the chance of winning one or two prizes in a lottery ; for the capital has to be refunded to them intact at the end of the term. Any illegality attaching to the interest arrangement will not necessarily affect the claim for the capital. I do not consider that it is right to hold in the circumstances of this case that any portion of the money stated to have been paid by the plaintiff has been actually paid out as prizes ; for the condition to return the money at the end of the term excludes such an inference.

Nagappa Pillai v. Aruna-chalam Chetty.

Krishnan, J.

In the case in *Sankunni* v. *Ikkora Kirtti* (1) the learned Judge did not have his attention drawn to the point of view above set out, the respondent not having been represented before him. In the view I am taking it follows that the plaintiff's suit is maintainable as brought and it is not necessary to refer to the various English and Indian cases cited before us.

I would therefore set aside the decree of the District Munsif and remand the case to him for disposal on the merits and direct defendant to pay the costs of this Civil Revision Petition to the plaintiff; and direct other costs to abide and follow the result and the stamp duty for this petition to be refunded.

Odgers, J.

Odgers, J.:—This is a Civil Revision Petition by the plaintiff in a small cause suit. He sued for the recovery of a sum of money representing his subscriptions to a certain chit fund and interest. The District Munsif found the chit in question was a lottery and relying the ruling in *Sankunni* v. *Ikkora Kirtti* (1) dismissed the plaintiff's suit. The first question therefore is whether the District Munsif was right in his opinion that the chit was a lottery. It consisted of 500 tickets of a rupee each and was to continue for 50 months. On the 5th of every Tamil month two prizes were to be drawn of Rs. 25 each, a winner of one prize in the series paid annas eight only as monthly subscription after winning: a winner of 2 prizes paid nothing subsequently. The prize-winners each month were determined by lot. It is contended that this chit fund falls within the scope of the ruling in *Kamakshi Achari* v. *Appavu Pillai* (2), where it was laid down that a transaction is not necessarily a lottery within Act V of 1844 because some matter is agreed to be decided by lot. In that case it was to be determined by lot which of the subscribers should be entitled to take the whole amount of the month's subscriptions. All got their subscriptions returned, it was only the loan of the common fund which was determined by lot. The present case goes much further than this. A lottery not authorized by Government is now illegal by virtue of S. 294-A, Indian Penal Code, and in the present case it is clear that in the most favourable event a subscriber could draw 2 prizes or Rs. 50 at the first drawing, *i. e.*, on subscribing rupee one. In the least favourable event he drew no prize and got his subscription back at the end

1. (1919) M W N 570. 2. (1863) 1 M H C R 448.

Nagappa Pillai *v.* Arunachalam Chetty.

Odgers, J.

of the 50th month. This chit fund proceeded for 26 or 27 months and the proprietor or stake-holder then stopped the chit, on hearing, it is said, of the judgment of Phillips, J. reported in *Sankunni* v. *Ikkora Kirtti* (1). The present suit is to recover back the instalments already paid by plaintiff as subscriber to the chit. I have no doubt that the chit fund under consideration is a lottery or distribution of prizes by lot or chance and is therefore illegal under the law. The appellant before us however urges that the lottery can be and ought to be separated from the contract to return the subscriptions at the end of the 50th month and that as the plaintiff's subscriptions in the hands of the stake-holder have not yet been applied to the illegal purpose, they can be recovered. That part of plaintiff's subscriptions has gone in paying the prize winners is clear. Further plaintiff has taken his chance in the lottery of drawing one or two prizes every month for 26 or 27 months. His name or number has been placed in the lottery for each one of those drawings. He has not chanced to draw a prize though he has competed for it by taking part in the lottery. I do not see therefore how the two things can be kept distinct. The plaintiff argues that the case falls within the law as to wagers, *i. e.,* S. 30, Contract Act and corresponding to S. 18 of the Gaming Act, 1845 (8 and 9 Vic. c. 109). There was some argument before us that S. 65, Contract Act applied to this case. I am of opinion that it is wholly inapplicable—the agreement here is not discovered to be void nor did the contract become void—it was illegal from the beginning. Under the section of the Gaming Act it has been held that the words prohibiting the recovery of money 'which shall have been deposited to abide the event upon which any wager shall have been made' do not prevent the party from repudiating the wager at any time either before or after the event and before the money is actually paid over and recovering his own deposit from the stake-holder. Cf. *Hampden* v. *Walsh* (3) whether the authority of *Hasllow* v. *Jackson* (4) is established and *Diggle* v. *Higgs* (5) in the Court of Appeal. Both cases were approved by the Privy Council in *Trimble* v. *Hill* (6). Therefore, when money has been paid under an unlawful agreement but nothing else done in performance of the latter, the money may be recovered back. *Tappenden* v. *Rundall* (7)

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1. (1919) M W N 570. 3. 1 Q B D 189. 4. 8 B and C 221.
5. 2 Ex D 422. 6. 5 A C 342. 7. (1801) 2 B and P 467.

Nagappa Pillai v. Arunachalam Chetty.

Odgers, J.

followed in *Ledu Coachman* v. *Hiralal Bose* (8). The exception engrafted on the section of the Gaming Act by this case is probably confined to cases where the agreement is not actually criminal or immoral. See particularly per Chambers, J., in *Tappenden* v. *Rundall*(7). If this is so, the present case would appear to be outside the benefit of the exception as falling within the Criminal Law. Even otherwise the effect of *Kearly* v. *Thomson* (9) and *Taylor* v. *Bowers* (10) is that the recovery may be made before the illegal purpose or any material part of it is carried out. Fry, L. J. at p. 747 in *Kearly* v. *Thomson* (9) says :—" I hold therefore that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible though there remains something not performed, that the money paid under that illegal contract can be recovered back." On this case can it be said here that no material part of the illegal purpose has been carried out ? I think not. 26 or 27 months have elapsed out of the 50 originally contemplated or more than half the term of the lottery has run and prizes have been awarded by lot every month up to the time the lottery was brought to an end. One has little sympathy indeed with the defendant, who has enriched himself at the expense of his subscribers but where both plaintiff and defendant are in *pari delicto*, and there is no ground here whatever for holding that they are not *potir est conditio possidentis* and in my opinion the plaintiff is not entitled to recover. The Civil Revision Petition must therefore be dismissed. I should like to express my indebtedness for the assistance of the able arguments advanced by the learned vakils in this case, Mr. Sivaramakrishna Aiyar for the appellant and Mr. Sundaram Aiyangar who, in the absence of the respondent, kindly argued the case as *amicus curiae.*

This petition coming on again " for argument " on Thursday the 13th day of March, 1924 and having stood over for consideration this day, the Court delivered the following

Krishnan, J.

JUDGMENTS :—*Krishnan, J.* :—We have differed in our opinion as to the result of the revision. The question now to be decided is whether clause 36 of the Letters Patent or S. 98 of the Civil Procedure Code applies to the case.

S. 98 in terms applies only to appeals under the Civil Procedure Code. S. 108 makes it applicable to second appeals but there is no similar provision making it applicable to revision

7. (1801) 2 B & P 467.
8. (1915) I L R 43 C 115.
9. (1890) 24 Q B D 742.
10. 1 Q B D 291.

Nagappa Pillai v. Arunachalam Chetty.

Krishnan, J.

petitions under S. 115, Civil Procedure Code, or under S. 25 of the Small Cause Courts Act, or under the Government of India Act. S. 141 cannot be relied on for applying S. 98 to such proceedings as it refers only to procedure provided for suits and not for appeals as pointed out in the case in *In re, Karri Venkanna Patrudu* (11). Furthermore as pointed out by their Lordships of the Privy Council in *Thakur Prasad* v. *Fakir Ullah* (12), S. 647 corresponding to the present S. 141 refers to matters in the nature of suits such as proceedings in probates, guardianships and so forth ; it does not refer to revision petitions in the High Court. When the High Court acts in revision in a small cause suit it does not do so under the Civil Procedure Code but under S. 25 of the Provincial Small Cause Courts Act and S. 98 cannot be applied to it in the absence of a special provision so applying it. On the other hand S. 7 of the Civil Procedure Code expressly excludes the applicability of S. 98 to Small Cause Courts. S. 115 is also excluded showing thereby that S. 7 is not confined in its application to Small Cause Courts in their original jurisdiction when trying suits but applies also to Courts exercising revisional powers in small cause matters. S. 7 seems to be conclusive to show that S. 98 does not apply to small cause revisions.

On the other hand there is no difficulty in applying cl. 36 of the Letters Patent though it speaks only of original and appellate jurisdictions. It has been consistently held that the expression "appellate jurisdiction" in this clause includes revisional jurisdiction. [See *Chappan* v. *Moidin Kutty* (13) and *Srinivasa Aiyangar* v. *Ramaswami Chettiar* (14)]. This view is further supported by the recent amendment of S. 15 of the Letters Patent excluding judgments in civil revision cases from the class of appealable judgments. As pointed out by Edge, C. J. in *Hussaini Begam* v. *The Collector of Muzaffarnagar* (15) the provision in the Letters Patent must be applied to all cases in the High Court except those to which S. 575 of the old Code, now S. 98, can properly and without straining its language be applied. In that case cl. 27 of the Allahabad Letters Patent, corresponding to cl. 36 of ours, was applied to a case where the learned Judges differed on the question

11. (1915) 18 M L T 591. 12. (1894) I L R 17 A 106 : 5 M L J 3 (P C).
13. (1898) I L R 22 M 68 : 8 M L J 31 (F B).
14. (1915) I L R 39 M 235 : 29 M L J 12 (F B).
15. (1889) I L R 11 A 176 at 182.

Nagappa Pillai v. Arunachalam Chetty.

Krishnan, J.

whether sufficient cause for excusing delay in filing an appeal had been shown or not. Recently the Privy Council had to consider the question whether S. 98, Civil Procedure Code or the Letters Patent applied to an appeal from a decree passed on the Original Side, see *Bhaidas Shivdas* v. *Bai Gulab* (16). Their Lordships refer to Ss. 4 and 98, Civil Procedure Code, and point out that there is no specific provision in S. 98 and that there is a special form of procedure which was already prescribed, namely, cl. 36 of the Letters Patent and therefore under S. 4, the former could not be treated as controlling the latter. It was held in *In re, Karri Venkanna Patrudu* (11) already referred to that cl. 36 of the Letters Patent applied where two Judges differed in a matter under S. 476, Criminal Procedure Code. A similar question was again decided by a Full Bench of this Court in *Bapu* v. *Bapu* (17) in the same way, holding that the power conferred by S. 195 of the Criminal Procedure Code was a special power and therefore the case was governed by cl. 36 of the Letters Patent. Similarly by analogy it may be argued that as the exercise of our power under S. 25 of the Small Cause Courts Act is the exercise of a special power it is not governed by the Civil Procedure Code. In an application under S. 107 of the Government of India Act to revise an order under S. 145 of the Criminal Procedure Code, the Calcutta High Court followed the ruling in *Bapu* v. *Bapu* (17) and held that cl. 36 of the Letters Patent applied. [See *Mariam Bewa* v. *Merjan Sardae* (18)]. It was also held in *Chandra Kishore* v. *Basarat Ali* (19) that in a case under S. 115, Civil Procedure Code, cl. 36 applied and the opinion of the Senior Judge prevailed.

Against all this authority there is an expression of opinion in a case in the Madras Reports that in a small cause revision in the High Court, S. 575 of the old Code corresponding to the present S. 98 applies by reason of S. 647, now S. 141, and not the Letters Patent. [See *Narayanaswami Reddi* v. *Osuran Reddi* (20)]. Though that opinion was given by a Bench of three Judges I consider that it was an *obiter dictum* as the Letters Patent appeal before the learned Judges was disposed of on the merits and nothing turned upon which judg-

11. (1915) 18 M L T 591.
16. (1921) I L R 45 B 718 40 M L J 519 (P C).
17. (1912) I L R 39 M 750 : 22 M L J 419 (F B).
18. (1919) I L R 47 C 438.
19. (1917) 27 C L J 418.
20. (1901) I L R 25 M 548.

Nagappa Pillai v. Arunachalam Chetty.

Krishnan, J.

ment prevailed in the revision petition. The point was not discussed by the learned Judges possibly because it was a matter of no consequence in the appeal. I do not think we are bound by that expression of opinion or that there is any necessity to refer the matter to the Full Bench again. The weight of that opinion is lost by reason of the subsequent rulings of this Court particularly that of the Full Bench in *Bapu* v. *Bapu* (17). I hold therefore that cl. 36 applies to the present case and not S. 98, Civil Procedure Code, and that our order in the Civil Revision Petition must be in the terms proposed by me.

Odgers, J.

Odgers, J. :—This was a petition under S. 25 of the Provincial Small Cause Courts Act, which runs as follows :—

"The High Court for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit."

It will be remembered that the suit was brought in the Small Cause Court for the recovery of certain subscriptions to a chit fund. The lower Court dismissed the plaintiff's claim on the ground that the chit fund was a lottery. In this Court my learned brother and myself differed in opinion. My learned brother held that the illegal element in the lottery could be discovered from the legal part in so far as it conformed to the ordinary chit fund transactions with which we are all familiar. I held, on the other hand, that the illegality tainted the whole transaction and that therefore the plaintiff could not succeed and his suit should be dismissed.

Now the question has been raised whether my learned brother's judgment should prevail under paragraph 36 of the Letters Patent as being the opinion of the senior Judge or whether it is open to us to make a reference in the matter under S. 98, sub-section 2, Civil Procedure Code.

It is clear that this is not an appeal, and although it is called a revision petition it is doubtful whether it is really of that nature. It is a special procedure provided by S. 25 of the Provincial Small Cause Courts Act, by which, if so advised, the High Court can correct an erroneous order passed by the Small Cause Court. Several authorities have been cited to us, but I do not think it necessary to refer to them all. In *In re, Karri Venkanna Patrudu* (11), two learned Judges,

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11. (1915) 18 M L T 591.

17. (1912) I L R 39 M 750 : 22 M L J 419 (F B).

Nagappa Pillai v. Arunachalam Chetty.

Odgers, J.

Abdur Rahim and Ayling, JJ., had differed on a petition under S. 115, Civil Procedure Code to revise the order of a District Munsif who had committed the petitioner to a Magistrate on a charge of perjury. The learned Judges of the High Court differed. Mr. Justice Abdur Rahim was for setting aside the order under S. 476, Criminal Procedure Code. Mr. Justice Ayling saw no reason to interfere. The Court held that cl. 36 of the Letters Patent applied to the case and that S. 141, Civil Procedure Code, did not make S. 98 applicable to matters of this kind. That case was, of course, strictly a case of revision and the Privy Council had held in *Bhaidas Shivdas* v. *Bhai Gulab* (16) that the two provisions, cl. 36 of the Letters Patent and S. 98, sub-section (2), Civil Procedure Code, do not affect each other. The case before their Lordships was a difference of opinion on an original side appeal to which Chapter VII of Civil Procedure Code has, of course, no application. But it is quite obvious from their Lordships' judgment that there is no ground for contending that S. 98, Civil Procedure Code, has obviated the provisions of cl. 36 of the Letters Patent. The case in *Bapu* v. *Bapu* (17) was a difference of opinion in a sanction matter and the Full Bench held that an application to the High Court under S. 195, Criminal Procedure Code, was neither an appeal nor a revision but a matter of special procedure and that therefore cl. 36 of the Letters Patent would apply on a difference of opinion. This seems to me to be a strong authority, for holding that cl. 36 of the Letters Patent would apply to the case before us, because as pointed out S. 25 of the Small Cause Courts Act is a special procedure and in my opinion is not a revision. The difficulty in adopting this view is caused by a case reported in *Narayanaswami Reddi* v. *Osuran Reddi* (20). It is not a Full Bench case though it was heard by a Bench of three Judges, and it is *prima facie* a case on all fours with the present. There an unsuccessful defendant in a Small Cause Court filed a Civil Revision Petition to this Court. One learned Judge was of the opinion that the case should be remanded for disposal while the other held that the case was not one in which the High Court should interfere. The defendant preferred an appeal under Cl. 15 of the Letters Patent, and an objection was taken that there was no judgment in the strict sense of the term from

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16. (1921) I L R 45 B 718 : 40 M L J 519 (P C).
17. (1912) I L R 39 M 750 : 22 M L J 419 (F B).
20. (1901) I L R 25 M 548.

Nagappa Pillai v. Arunachalam Chetty.

Odgers, J.

which an appeal could be taken. The Court held that there was a judgment and further that the case was governed by S. 575 (corresponding to S. 98), Civil Procedure Code. The learned Judges distinguished the case cited to them for the appellant [*Hussain Begam* v. *The Collector of Muzaffarnagar* (15),] which held cl. 36 of the Letters Patent applicable on the ground that there had been no hearing of the appeal within S. 575 (equivalent to S. 98), Civil Procedure Code, and that in the case before them there was a hearing of the petition by the two Judges who differed as to the way the petition should be disposed of. The point was very summarily dismissed, if one may say so with respect, by the Bench in *Narayanaswami Reddi* v. *Osuran Reddi* (20) but even so, I was at first inclined to think that it might be entitled to weight with me in the present case. Even though, for the reasons I have given I am doubtful if *Narayanaswami Reddi* v. *Osuran Reddi* (20) can now be considered good law in face of the decision in *In re, Venkanna Patrudu* (11) the Privy Council decision in *Bhaidas Shivdas* v. *Bai Gulab* (16) and more especially the inference to be drawn from the Full Bench decision of this Court in *Bapu* v. *Bapu* (17). Under these circumstances I was inclined to the view that the only satisfactory way to clear up this difficulty which, it is obvious, may recur at any moment, was to have an authoritative decision by a Full Bench on the point. On further consideration however I have come to the conclusion that this is unnecessary; the opinion expressed in *Narayanaswami Reddi* v. *Osuran Reddi* (20) is in almost a single line, the point is not discussed and further the Judges there held they were entitled to go into the merits which they did and reversed the opinion of Subramania Aiyar, J., whose judgment it was contended prevailed under the Letters Patent. As pointed out this is not a Full Bench case and is therefore not technically binding on us. I have already given reasons for thinking its opinion unsound. I therefore agree that Clause 36 of the Letters Patent governs this case, and the judgment of my learned brother as senior Judge must prevail.

T. S. V. *Petition allowed.*

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11. (1915) 18 M L T 591.
15. (1889) I L R 11 A 176.
16. (1921) I L R 45 B 718 : 40 M L J 519 (P C).
17. (1912) I L R 39 M 750 : 22 M L J 419 (F B)
20. (1901) I L R 25 M 548.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

The M. & S. M. Railway Co., Ltd. *Appellants** (*Defendants*).

v.

Jayammal *Respondent* (*Plaintiff*)

Madras & Southern Mahratta Railway Co., Ltd. *v* Jayammal.

Negligence—Child of seven years crossing railway line—Injury by a passing engine—Failure to look out on the part of the child—Railway Company allowing villagers to cross the line—Trespassers and licensees—Position of—Doctrines of trap and allurement—Contributory negligence on the part of children.

The plaintiff, a little girl of seven, while crossing a railway line with a bundle of grass on her head was run over by a locomotive engine and lost her right arm and her right leg. The evidence showed that the engine-driver did not see the child before the accident happened and the fireman saw the child only at a distance of four or five feet from the engine. It was also in evidence that the people living in the neighbourhood were in the habit of crossing the railway line and using it as a short-cut to the knowledge of the Railway authorities. In a suit for damages, *held,* reversing the decision of the Trial Court, the Railway Company was not liable.

Per Spencer, O. C. J. :—The danger of being run over by a passing engine when crossing railway line imposes a necessity for the utmost caution on all persons walking on or near the track and if they cross the line at an unrecognised crossing, they do so at their peril. The plaintiff was guilty of negligence in not keeping a sharp look out for passing engines, an obvious danger. She was only a licensee, if not a trespasser, and under the law the defendants could not be liable unless they have placed any trap. The existence of the short-cut and the failure to prevent villagers from crossing the line could not amount to a trap or an invitation to cross or an "allurement" within the meaning of the word in the reported cases. *Held* also, on the facts the engine could not have been brought to a standstill within the distance of four or five feet, nor were the Railway servants negligent and the accident was entirely due to the gross negligence of the plaintiff in failing to keep a proper look-out.

In cases of such accidents, if both parties are negligent, it is the party who is last negligent who is made responsible for the same. English case-law referred to.

Per Srinivasa Aiyangar, J. :—Whether any particular act or omission constitutes negligence must be decided with reference to the person injured, the manner in which the injury was occasioned, and the time, place and circumstances of each case. On the facts, *held,* as the Railway Company had, without any effective objection, allowed the villagers to cross the line for a long time, they were guilty of negligence as they failed to prove a "special look-out" on the part of the engine-driver on the occasion in question.

Allowing the villagers to cross the railway line does not amount to an implied license in favour of infants of tender years who are unable to take

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*O S Appeal No. 61 of 1923. 12th September, 1924.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

care of themselves or incapable of avoiding dangers necessarily incident to the place. The proximate cause of the accident was the contributory negligence of the plaintiff in failing to look about to see if any train was approaching and hence she could not recover damages.

Even a child of seven can be guilty of contributory negligence and the law on the subject has not been in any way altered by *Cook v. Midland and Great Western Railway Co., of Ireland,* (1909) A C 229 or *Corporation of the City of Glasgow* v. *Taylor,* (1922) 1 A C 44.

On Appeal from the judgment of the Hon'ble Mr. Justice Coutts-Trotter, dated the 20th April, 1923, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 465 of 1922.

The Judgment of the Trial Court is reported in 45 M. L. J. 545.

Vere Mocket instructed by *Messrs. King* and *Partridge* for appellants.

M. P. Sundararaja Aiyar for respondent.

The Court delivered the following

Spencer, Offg. C. J.

JUDGMENTS :—*The Officiating Chief Justice* :—The plaintiff-respondent is a little girl of seven years of age who was run over by a locomotive engine at Wallajah Road Railway Station and lost her right arm and her right leg. She has been awarded Rs. 3,500 damages and costs in the Court of First Instance by Coutts-Trotter, J. The Railway Company has appealed.

The facts are clear that the plaintiff, who lived with her father in the village of Ammur adjoining Wallajah Road Station, crossed the line in order to go to her grandmother's house and that she was returning with a basket full of grass when she was knocked down by the Engine of the Ranipet train which had left its carriages standing by the platform after uncoupling and had gone up the line eastwards, tender foremost to the points, then reversed, and was running down, head foremost, along the loop line towards the engine shed where it had to water, when the accident happened. The plaintiff herself states that on her way home she crossed by the way leading from the wicket gate near the Assistant Station Master's house, the engine ran over her, and she was injured. Of her 4th and 5th witnesses, who are merchants professing to have been eye-witnesses of the accident, P. W. 4 states :— " The girl came with a basket of grass on her head and entered the gate and was walking towards the west. She had to pass

along the line a little to reach the station platform and then go to her village. When she put her leg on the line the accident happened." P. W. 5 states :—" The girl with a basketful of grass over her head entered the gate and turned towards the west. She went and then turned to the north to go to the big platform which was sloping. The engine came and she was run over. " The engine driver, D. W. 2, was standing on the right hand side of the engine and driving it. He, therefore, did not see the child before the accident happened. D. W. 4, a fireman on the engine, was standing on the left hand side and suddenly saw the child at a distance of four or five feet from the engine. The fact that the child's right arm and right leg were run over by the engine wheels makes it probable that she was knocked down just as she was stepping on to the line from the south and that she was hit on the right side by the engine. This accords with the statements of the eye-witnesses who profess to have seen the accident and with her own account. There is evidence that people living in the neighbourhood were in the habit of crossing the railway line first over the overbridge and then from the platform crossing the station-yard in a direction which led to a wicket gate beside the Assistant Station-master's house. There is no evidence that there was a worn foot-path in this direction, but there is no reason to doubt the statements of the witnesses that this short-cut was being used. The driver of the engine and a fireman (D. W. 4) stated that the whistle was blown when the engine was uncoupled from the train and again when it started down the loop line to go westwards. The plaintiff said that no whistle was blown. P. W. 3, the Branch Post-master, says that no warning was given. The next witness was not asked. The 5th witness says he did not hear any whistle. The Station-master (D. W. 5) does not remember whether it was blown. The learned Judge rightly observed that the witnesses cannot be expected to be able to speak from memory as to whether the usual formality of blowing the whistle was observed on that day unless there was something to call their attention to the fact.

The existence of a wicket gate close to the Assistant Station-master's house has been made much of. There is a notice board warning persons not to use that crossing, but whether it was in existence before the accident happened has been questioned. I do not consider that the existence of the

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Spencer, Offg. C. J.

wicket gate is a material circumstance in the case. Even if it had been kept locked, as suggested by the learned Judge in the Court below, it would have been easy for children like the plaintiff to have slipped through the wire fencing that enclosed the station-yard.

On the evidence I find that the proximate cause, the *causa causans* as it is called, of the accident was that the plaintiff stepped on the railway line in front of a moving engine and that she was guilty of negligence in not keeping a sharper look-out for passing trains when she was crossing the line at an unauthorised place of crossing. As she was carrying a load of grass on her head, it is likely that she could not readily turn her head to the right and left and look up and down the line and see if anything was coming. Though she was capable of appreciating danger and was old enough to have a sense of circumspection, she did not use it owing to the heedlessness of youth or the burden on her head. The accident happened in broad daylight. The engine was an obvious danger, capable of being perceived even by a child of tender years. She must have seen the train standing by the platform without its engine if she had looked in front of her. The fact that the engine had gone to the east was no guarantee that it would not return along the line which she was about to cross. The danger of being run over by a passing engine when crossing the railway lines imposes a necessity for the utmost caution on all persons walking on or near the track. Persons who cross an open railway line at an unrecognised crossing do so at their own peril. The plaintiff, if not a trespasser, was at least a licensee ; and, where a licensee is concerned, the owner of the premises is not liable for damage caused by the negligence of the licensee, provided that he does not place any trap in the way of those who come upon his premises. In the present case there was no trap, no allurement and no invitation. It has been suggested that leaving the wicket gate unlocked was an invitation to people wanting to go to the other side of the line to take the short cut instead of crossing by the level crossings further down on the east and west. The learned Judge on the Original Side held that this short-cut was not an "allurement" in the sense in which the phrase has been used in reported cases where negligence has been alleged. I have no doubt that the existence of a short-cut cannot itself be treated as an allurement. Otherwise, people might make short-cuts across the railway at any point, and the railway would always be liable for accidents occurring to

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal. — Spencer, Offg. C. J.

persons using the short-cuts, and no measure to prevent such accidents would be effective short of guarding the line at short intervals for its entire length, or putting up some impassable barrier. In *Cooke's case* (1) it was not the gap in the hedge but the turn-table which was the allurement, as it was used by the the youth of Navan as a kind of glorified merry-go-round (*vide* Lord Macnaghten's Judgment).

The decision of this case in favour of the plaintiff seems to be based upon two errors. In the first place, the learned Judge thought that, if a proper look-out had been kept on the left side of the engine, this accident could have been avoided either by blowing the whistle again, or by stopping the engine as soon as it got near the child. Secondly, the learned Judge was of opinion that what would be merely negligence in the case of an adult, in the case of children might be regarded as a trap and that the conduct of the railway officials was negligent in inviting children to cross lines of railway over which the Company's trains run.

On the first point there is no evidence in this case as to the distance within which an engine going at between five and ten miles an hour could have been brought to a standstill. The fireman, D. W. 3, first saw the child when she was four or five feet off. It is not likely that the engine could have been stopped within that distance. Unlike a motor-car, the course of a train cannot be altered to avoid running over pedestrians. Nor has it been proved that a proper look-out was not kept by the engine driver who was on the right side of the engine.

The respondent's pleader argues that the engine driver, knowing that the track between the wicket gate and the platform was being used by the public, should have kept a special look-out when they came near that spot. In *Davey* v. *London and South Western Railway Company* (2) (a most instructive case) Brett, M. R. laid down the law thus in a case where the plaintiff claimed damages from a Railway Company for negligence. He said: " In such an action as this the burden of proof lies entirely upon the plaintiff. There are two things for him to establish; one affirmative and the other negative. It is for the plaintiff to show that the accident which happened to him was caused by a negligent act of the defendants, or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants

1. (1909) A C 229. 2. 12 Q B D 71.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Spencer, Offg. C. J.

solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that, if the defendants' servants could by reasonable care have avoided injuring the plaintiff although he was negligent, then the negligence of the plaintiff would not contribute to the accident."

This imposes a duty upon defendants to do all in their power to avoid an accident in cases where one is imminent owing to the negligence of the plaintiff. This point is well brought out in the judgments of the Court of Appeal in *Gaffney* v. *The Dublin United Tramways Company* (3). In other words, it is the party who is last negligent who is made responsible for an accident arising from the negligence of both parties.

In *Davey's case* (2) Bower, L. J., observed:—"It was broad daylight, and as soon as he had entered the wicket gate—had he been a sensible man—he would have looked up and down the line to see if there was a train coming either way. A train was in fact so close to him that he was only able to cross fifteen feet before he found himself between its buffers, and yet he never took the trouble to look and see if the train was coming. Now is it open to any reasonable mind to draw the inference that that accident was caused by anything except the gross negligence of the man who never looked at a train which was within a few feet of him ?"

It seems to me that every reasonable mind which has before it the facts of the present case must agree that it was the gross negligence of the plaintiff which led her to step on the permanent way in front of an approaching engine without first assuring herself by looking to the right and the left that there was no possibility of being run over.

The facts of the present case do not support the inference that the Railway Company's servants were negligent. Supposing the driver had seen the plaintiff coming from the wicket gate towards the line, there was no reason for him to anticipate that she would attempt the very rash act of crossing in front of the engine. Every day drivers of cars and carriages seeing foot passengers on the public road proceed on the assumption

2. 12 Q B D 71. 3. (1916) Irish Reports, Vol. II, p. 472.

Madras & Southern Mahratta Railway Co., Ltd. *v.* Jayammal.

Spencer, Offg. C. J.

that they will act rationally and not commit the imprudence of running in front of a car or carriage. It would not be reasonable to compel drivers to form a mental estimate as to the age and capacity of taking care of themselves of every one of the pedestrians that they may meet in their way through traffic and to adjust their speed accordingly, though they would naturally proceed slowly past a school or playground where children are likely to congregate, as children are notoriously careless owing to their inexperience.

In *Burchell* v. *Hickison* (4) an action was brought on account of damage sustained by a boy of four years of age who fell through a gap in railings leading up steps to a house. It was held that there was no invitation to a person of the plaintiff's age to use those steps unless he was in charge of some older person who could take care of him, and if he was in charge of others, then there was no concealed danger. This gave rise to a dilemma. Coutts-Trotter, J. seems to have been of opinion that this case decided in 1880 no longer represented sound law and that it had been exploded by the decision of the House of Lords in *Cooke* v. *Midland Great Western Railway of Ireland* (1). That was a case of a turn-table which formed a great attraction to children living in the neighbourhood to play with. But it was a dangerous object when unlocked because, if used without care, it was liable to crush the user, as it did to the boy Cooke. In *Jenkins* v. *Great Western Railway* (5) a child of two and a half years was run over by an express train having got on the main line and it was held by the learned Judges that there was no invitation to trespass on the main line of the railway, although children had been allowed to play on a pile of sleepers close to dwelling-houses on the side of the line. The sleepers had not been properly fenced off so as to prevent children coming and playing upon them, and therefore it was held that they were licensees so far as the timber pile existed, but there was no invitation or leave to go on to the main line where the accident took place. It was considered that to hold that there was an invitation to cross the railway line would be an undue extension of the doctrine in *Cooke's case* (1), the ground of that decision being that there was leave and license to play with a turn-table which was a dangerous machine and that it was because the person injured availed himself of that leave and license he was

1. (1909) A C 229.
4. 50 L J Q B 101.
5. (1912) 1 K B 525.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Spencer, Offg. C. J.

injured. If the railway staff had left an unattended locomotive with steam up standing in the station-yard for boys to play with, I have no doubt that that would have constituted an allurement and the Company would have been responsible for the consequences. But I cannot agree that the failure of the Railway Company to prevent passengers from crossing the line through the wicket gate opposite the platform at the Wallajah Road Station was an invitation or allurement either to adults or children to cross the railway lines without proper circumspection. In *Fairman* v. *Perpetual Investment Building Society* (6) the House of Lords recently approved of the decision of the Court of Appeal in *Latham* v. *Johnson* (7) as containing a concise and accurate expression of well-known principles of law. In the latter decision *Burchell* v. *Hickison* (4) and *Lovery* v. *Walker* (8) are referred to as still being good law. Latham was a child hurt by playing with paving stones on unfenced waste land. As there was no allurement, nor trap, nor invitation, nor dangerous object, it was held that the defendants were not liable for the injuries caused to the plaintiff's hand.

The case of *Glasgow Corporation* v. *Taylor* (9), where a child of tender years was attracted by belladonna berries grown in a public garden which were a danger to young children unable to take care of themselves within the knowledge of those who put such plants in a public place, and the case of *Lovery* v. *Walker* (8), where a savage horse was placed in a field over which the public had a license to walk are easily distinguishable both from the facts in *Cooke's case* (1) and from the facts of the present case, the former being a case of a trap and allurement to children using a public right, and the second being a dangerous thing placed in the way of licensees, who did not know it to be dangerous as horses in general are not dangerous animals. The distinction between those cases and the present is that the plaintiff in the present case was not using a right of way across the rails when she was injured and that everybody knows an engine to be likely to hurt those who come in contact with it. In *Hughes* v. *Macfie* and *Abbott* v. *Macfie* (10) where a boy of tender age meddled with the flap of a cellar, which was placed so as to lean almost upright against a wall, judgment was given for the defendants, although it was stated that, if an adult passer-by had accidentally

1. (1909) A C 229. 4. 50 L J Q B 101. 6. (1923) A C 74 at 80.
7. (1912) 1 K B 398. 8. (1911) A C (H of L) 10.
9. (1922) 1 A C (H of L) 44. 10. 2 H & C 744.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Spencer, Offg. C. J.

and without carelessness pulled the flap over and been hurt, he might have successfully maintained an action for damages arising through negligence to which he did not contribute.

In *Singleton* v. *Eastern Counties Railway Company* (11) where a child of three and a half years of age who got on to a parapet of a bridge and had his leg cut off by a passing train, the action was dismissed, in spite of the fact that the driver made no attempt to stop the train, as it was held that the plaintiff was wrongfully upon the railway, and though he was only a child of tender age, the accident must have been due to his negligence or the negligence of his parents and through no fault of the Railway Company.

On the finding that the accident was due to the plaintiff's want of care and that the Railway Company and their officials were not guilty of negligence, the Appeal must be allowed and the suit dismissed. Under these circumstances the parties will bear their own costs.

While absolving the Railway Company from all legal liability for this sad accident, I consider that the pitiable plight of this unfortunate girl mutilated by collision with one of the Company's engines deserves the sympathetic consideration of the Agent of the Company and I rejoice to hear from the appellant's counsel Mr. Mockett that the Company have decided to give her some form of compassionate pension or a gratuity of a substantial amount.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—This is a most unfortunate case, for the necessary result of the conclusions I have felt bound to arrive at on the questions of fact and law argued before us in this appeal would be to deprive a little girl aged about 8 years of the benefit of the decree granted in her favour against the appellant Railway Company by Mr. Justice Coutts-Trotter as he then was. In the suit instituted on behalf of the minor girl by her father as her next friend, the claim was for damages in respect of the injuries caused to her by a engine belonging to the appellant Railway Administration, running over her, as the result of which both her right hand and right leg had to be amputated. But however much one's heart may go out in sympathy for the sufferings of the little plaintiff and more especially for the years of crippled and unhappy life awaiting her in the future, I do not see how I can fail to give

11. 7 C B N S 287.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal. — Srinivasa Aiyangar, J.

effect to my conclusions. Lord Justice Farwell observed in the case of *Latham* v. *R. Johnson and Nephew Limited* (7) :— "We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment : sentiment is a dangerous will-of-the-wisp to take as a guide in the search for legal principles." Nevertheless, one cannot but regret such a consequence following on one's conclusions.

Except in cases where the injuries are caused as the result of a wanton attack on the person of the plaintiff, in cases of claims for damages for personal injuries the cause of action generally is negligence ; that is to say, the charge against the defendant is to the effect that though the defendant was, at the time when the accident happened which caused the injury, doing something not in itself unlawful he was guilty of negligence in the doing of it, and that such negligence was the proximate cause of the injury. But what is negligence ? Whether any particular act or omission constitutes negligence would have to be decided having regard to the person injured, the manner in which the injury was occasioned and the time, place and circumstances in each case. Negligence is the failure to exercise proper care. But what is proper care depends on the time, place and circumstances.

It is once over again the apothesis of the law, the ideal man of ordinary prudence. What this ideal man of ordinary prudence would have done or omitted at the particular time and place and in the circumstances is the standard and measure of proper care and whenever and wherever the act or omission of the defendant falls short of this standard or measure then and there is negligence. It seems to me that the classification of the injured into trespassers, bare licensees, licensees, invitees, servants and so on has no more fundamental basis than the repeated application of this standard or measure to the varying circumstances. under which the injured persons came to be at the particular place and at the particular time. Thus before the plaintiff in such an action can be entitled to a verdict in her favour, it has to be proved that the appellant Railway Company in having the engine driven at the particular time and place and in the circumstances was guilty of negligence and that such negligence was the proximate cause of the injuries sustained by the plaintiff.

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7. (1912) 1 K B 398 at 408.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Srinivasa Aiyangar, J.

For the determination of these questions, the first thing to be considered is whether the plaintiff was at the time and place a trespasser or a licensee. It is not, however, as if that a licensee as such has got any more rights so to say than a trespasser but the question becomes of importance only with regard to the other question, the main question in the case, whether or not the driving of the engine was negligent. For this purpose a trespasser is merely an unexpected visitor or, to put it a little more clearly, one whose visit to the place at the time and in the circumstances could not have been foreseen by a man of ordinary prudence. Similarly for this purpose the licensee is merely a person or a member of a class whose presence at the time and about the place should in the circumstances have been foreseen and provided for by a man of ordinary prudence. In this sense then, was the plaintiff at the time and place a trespasser or a licensee ? It seems to me that to this question there can on this evidence be only one answer. There is considerable independent testimony, which I have absolutely no reason to doubt or refuse to accept, that the villagers of Ammur have been for a long time allowed by the Railway authorities without any effective objection, to cross the Ranipet line and pass through the wicket gate both on their way from the part of the main village on the northern side of the line to the part of the village on the southern side of the line and back again. The following extract from the evidence of Rupert Johnson examined as the second witness for the defence puts it beyond all doubt :—

Question :—You keep a special look-out when you come near the wicket gate to see that the passengers do not cross the line ?

Answer :—Yes.

This is conclusive evidence as regards the knowledge and consciousness on the part, at any rate, of the most important servant of the Railway Company concerned, namely the engine driver. It is an admission that persons passing through the wicket gate were in the habit of crossing the line at that point. It is also an admission for the consequent necessity on the part of the Railway servants to keep a special look-out at the place. If therefore the presence of persons crossing the line at the place was or must have been anticipated, it follows that the plea of the Railway Company that the plaintiff was a trespasser fails or at any rate loses its point. The degree of prudence

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal. — Srinivasa Aiyangar, J.

therefore incumbent on the Railway Company, namely, the need for special look-out at that point in the line having thus been admitted, it becomes unnecessary to discuss further that aspect of the case. But it is one thing to say that generally persons were suffered by the Railway authorities to cross and re-cross the line at the particular point and another thing to say that such sufferance amounted also to a similar permission by the Railway Company in favour of infants of tender years unable to take care of themselves or incapable of avoiding dangers necessarily incidental to the place. I cannot possibly suppose that any implied license by the Railway Company could extend to such infants. But on the evidence I am unable to hold that the plaintiff, though stated to be only seven years of age, was an infant unable to take care of herself or of avoiding dangers incidental to the place. It was not the first occasion on which she was there crossing and re-crossing the line and as a fact it is clear she had been doing so alone by herself for quite a considerable time previously. Her parents would seem not only to have allowed her to do so but to have sent her on errands on which she was crossing and re-crossing the railway line at the point.

It follows necessarily from all this that the plaintiff had sufficiently developed in her the faculty of circumspection and the capacity of taking care of herself even in such somewhat dangerous surroundings. If, on the other hand, the contention on behalf of the plaintiff should be that she had not attained such faculty and such capacity the necessary result of it would obviously be that in such a case the Railway Company could not be deemed to have included in any such implied license a person of such tender years. This, in passing, I may state is the dilemma referred to by Lord Justice Hamilton at page 414 in the course of his judgment in *Latham's case* (7). I must therefore find that the plaintiff was not a trespasser so-called but was as found by the learned Judge in the Trial Court a person whose presence in or about the place was or must have been anticipated by those in charge of the engine.

I shall now proceed to the question whether or not the negligence charged has been established. I gather that four acts of negligence have been so charged against the Railway Company. In para. 6 of the plaint there seems to be in the word " had he slowly backed " a suggestion that the engine was at the time of the accident being driven not slowly but fast.

7. (1912) 1 K B 398.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Srinivasa Aiyangar, J.

This was not even sought to be proved. In the same paragraph the word "backed" would seem to indicate that the train was at the time of the accident tender foremost. I do not see how this matters. Further the evidence in the case undoubtedly points to this allegation being correct. In the same paragraph 6 of the plaint another charge made is that the whistle was not blown. This charge is not sufficiently particular. If the reference is to the practice of sounding the whistle of the engine when it is about to start from the east on its journey to the engine-shed towards the west, I must say that the evidence with regard thereto is discrepant and not by any means satisfactory. For one person that heard the whistle a hundred persons even in or about the place might not have attended to it and therefore not heard it and it requires very strong and cogent evidence to establish a negative. Further, I am unable to appreciate how a whistle by the engine some hundred yards off would have averted the accident.

The charge in para. 7 of the plaint is substantially to the effect that though the Railway Company had reason to know that the public was in the habit of crossing the line at the point, proper safeguards were not adopted. The extract from the evidence of the engine driver which I have already reproduced above goes to show the need for and the practice of "special look-out" by those in charge of the engine while passing near the wicket gate. There is absolutely no evidence whatever of such special look-out having been kept either by the driver or any other person in, or in charge of, the engine. No one says that a special look-out was kept by any person on the engine. The driver was on the right side, and if he was on the look-out from a place sufficiently far off on the east from the wicket gate, I fail to see how he could have failed to notice the plaintiff and assuming he was unable to see who was passing on the left side, there is no evidence whatever as to what look-out was kept on the left side of the engine. I hold therefore agreeing entirely in this respect also with the learned Trial Judge that the special look-out spoken to by the engine driver has not been proved and that therefore the appellant company was guilty of negligence on the occasion.

Assuming however that there was this negligence on the part of those who were in charge of the engine at the time of the accident, it does not necessarily follow that such negligence was the sole or even the proximate cause of the accident.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Srinivasa Aiyangar, J.

The theory of contributory negligence is not a special or separate branch of the law nor is the theory which relates to what may be called the further or secondary negligence of the defendant. They are all but different aspects of the one sole question in the case 'What was the proximate or effective cause of the accident ?' If the defendant was negligent, still if the plaintiff could have by the use of ordinary prudence avoided the accident the plaintiff is held not entitled to recover, not because he was also negligent but only because the proximate cause of the accident should be held in such cases to have been not the primary negligence of the defendant but really the negligence on the part of the plaintiff which was what largely contributed to the result. Similarly, if in spite of the negligence or, as it is called, the contributory negligence of the plaintiff, the defendant could even then by the exercise of ordinary care have avoided the accident and injury, the plaintiff is held entitled to recover not because he was not negligent but only because the negligence that proximately caused the injury was the negligence not of the plaintiff but of the defendant. The whole thing therefore is a problem in causation and Courts of law are allowed and required to do their best to piece out the events and arrive at a conclusion with regard to the proximate or as it may be otherwise called the effective cause of the accident or injury. It follows from this that assuming that the appellant company was through the persons in charge of the engine at the time and place of the accident guilty of the negligence found against them, did that negligence alone cause the accident or was there anything that the plaintiff did or failed to do on the occasion which was really the proximate and effective cause of it. What happened then in this case ? It may be that when the plaintiff entered through the wicket gate and was about to turn to the left to pass alongside the rails she might not have noticed the engine which might have been still at some distance to the east. The plaintiff after going some distance alongside the line towards the west, turned to her right again with the object of crossing the line and either while she was so turning to cross the line or as she had taken just a step with a view to cross, she was according to the evidence knocked down by the engine. The fact that her right hand and right leg alone were injured would seem to show that the impact of the engine was on the right

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Srinivasa Aiyangar, J.

side and was such as to throw the whole of the left side and also the trunk of the body beyond the line of the left wheels of the engine. It seems to me that this could have happened only if the impact of the engine against the plaintiff was just as she was turning to cross, her left side still not quite turned. It is only in such a case that the impact of the engine would have served to throw the left side and the trunk outside the line of the wheels while the right leg and the right hand would fall just under the line of the wheels. From this it follows that while she was in the act of turning, the engine was not on the rails directly in front of her but must have been only about 5 or 6 feet off. I take it that even in the case of an infant of about 7 years, the ordinary instinct of self-preservation would have impelled her to withdraw, if when about to turn she had noticed the engine. I have therefore to conclude that she did not look to the right before crossing. It seems to me that it was not even necessary to look to the right because such a huge thing as an engine at a distance of 5 or 6 feet could not possibly have failed to draw her attention to it. It is also strange that she should not have either heard the noise of the approaching engine or perceived the vibration caused by its nearer and nearer approach. I am therefore led to conclude that the plaintiff must have been on the occasion either very absent-minded or her child-nature so wholly absorbed in something else as to leave no attention available for hearing the noise or perceiving the vibration or see the form of the approaching engine. This was not the conduct of a person of ordinary prudence. No person of ordinary prudence would especially while in attempting to cross the railway line fail to look about to see whether any train was approaching. But if she was not capable of circumspection or taking care of herself, she ought not to have trusted herself there or have been allowed by her reckless parents to cross and re-cross the line without some care taken. If she was capable of circumspection or of taking care of herself, she failed to exercise ordinary prudence before turning to cross the line. Her failure to realise that the engine was approaching could only be ascribed to carelessness on her part. If she had exercised such ordinary care, the accident would have been averted or avoided in spite of the negligence of the Railway Company.

A further argument was advanced to us on behalf of the plaintiff, that, assuming that she was negligent, even then when the fireman noticed her and cried out, the engine should have

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Srinivasa Aiyangar, J.

been stopped and the injury averted. This argument was based on the principle of what is called "The Donkey Case," *Davies* v. *Mann* (12). I do not think it could possibly have been managed. The engine must have been within a few feet of the plaintiff and in any case there is absolutely no evidence on which I could hold that it was possible to bring the engine to a dead-stop at such short notice and distance.

I have therefore come to the conclusion and feel constrained to hold that as the injury could have been avoided by the plaintiff herself by the exercise of ordinary care on her part and was brought about by her failure and omission to exercise some circumspection, her own negligence was the proximate or effective cause of the accident.

Reviewing the facts of this case, I almost wish that the law were that in such a case the damages should be apportioned between both the parties held to have been negligent as they do in Admiralty cases ; but as observed by Lord Birkenhead in a recent case, *Admiralty Commissioners* v. *S. S. Volute* (13) : "In a Court of Common Law the plaintiff has no remedy if his negligence in any degree contributed to the accident." In the result it follows that the plaintiff cannot recover.

It only remains for me briefly to examine the grounds on which the learned Judge who tried the case came to a different conclusion.

Summing up his findings the learned Judge observes as follows :—" I entertain no manner of doubt that if a proper look-out had been kept on the left hand side of the foot-plate, that on the side of the wicket gate, this accident could almost certainly have been avoided. A second whistle might have been given to warn the child and if it were observed to be unheeded, the engine could have been stopped as soon as it got into dangerous proximity to the child." I entirely agree with this observation of the learned Judge. But he has not paused for a moment to consider what, assuming this negligence on the part of the Railway Company, was the conduct of the plaintiff and whether her negligence such as it was, was not the more proximate cause of the accident. He brushed aside that whole aspect of the case holding that a child of 7 could not possibly be guilty of contributory negligence. It was however at the same time assumed by the learned Judge that children, including in that expression children unable to take

12. (1842) 10 M W 546. 13. (1922) 1 A C 129.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Srinivasa Aiyangar, J.

care of themselves, should also be presumed to be included in the implied license given by the Railway Company. Though there was evidence of the plaintiff having been crossing the line, there is absolutely no evidence of the fact that this at any time came to the notice of the servants of the Railway Company and that they nevertheless permitted the plaintiff to cross knowing that she was still so young as not to be able to take care of herself. In the case of an implied license, the circumstances have to be looked to for the purpose of determining the terms of such implied license. In the case of *Jenkins* v. *The Great Western Railway* (5) the learned Judges of the Court of Appeal refused to infer from the circumstances a license from the Railway Company for a child of tender years to go upon the main line of a railway, even though the jury found a license for such a child to cross the fence and go and play on stacks of timber close by. And to the same effect is the judgment of the Court of Appeal in the case of *Latham* v. *Johnson and Nephew, Limited* (7). There is really no ground for the supposition made by the learned Judge that such case as *Stiefsohn* v. *Brookebond Co.* (14) was no longer good law. There was nothing in *Cooke's case* (1) or in any of the later cases to question the principle on which that case was decided. In that case Lord Justice Fry held that a child of 7 years even in England could be guilty of such negligence as to disentitle it to damages. The learned Judge says the danger was evident even to a child. I fail to see how it could be said that the danger of a running engine would not be obvious to a child of even 7 years in this country.

The dilemma I referred to was that if a child should be too young to take care of itself no license could be implied in its favour and if it were not too young to take care of itself, it would be capable of contributory negligence. It was in reference to this that the learned Judge observes as follows "That would seem to afford a complete dilemma but the later cases negative the soundness of such a view." The later cases referred to by the learned Judge are the *Cooke's case* (1) and *Taylor's case* (9). In another place referring to the doctrine of contributory negligence by a child on which Lord Justice Fry based his judgment in the case of *Stiefsohn* v. *Brookebond Company* (14) the learned Judge observes that the

1. (1909) A C 229.
5. (1912) 1 K B 525.
7. (1912) 1 K B 398.
9. (1922) 1 A C (H of L) 44.
14. 5 Tim L R 684.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Srinivasa Aiyangar, J.

later decisions of English Courts have left no room for such a doctrine. The learned Judge therefore, it is clear, proceeded on the assumption that *Cooke's case* (1) and *Taylor's case* (9) had the effect of reversing all the earlier decisions of the English Courts with regard to the possibility of a child being guilty of contributory negligence. If I may respectfully say so, it is this erroneous supposition that led the learned Judge after much hesitation, as he himself says, to arrive at the decision at which he did. It seems to me that these cases did nothing of the kind, but merely proceeded on a principle fairly established for a long time in English Law of the responsibility in law of a person leaving unguarded something intrinsically dangerous, something intrinsically alluring or tempting to child-nature at a place where as a person of ordinary prudence he must have had reason to believe that children were frequenting. In other words, those two cases proceeded and are clearly based on the doctrine of what is called allurement.

Allurement is an irresistible call to the emotions which for the time if it does not paralyse at any rate overwhelms the faculty of reasoning. I for my part do not see why the doctrine of allurement should be confined only to dogs and children and not be capable of extension even to adults if on the facts a proper case should arrive at any time. In *Latham's case* (7) Lord Justice Hamilton as he then was at page 418 says this : "Of *Cooke's case* (1) the following things are clear. Their Lordships declared no new law and overruled no old cases." It is remarkable that in the case of *Fairman* v. *Perpetual Investment Building Society* (6) Lord Buckmaster who dissented from a majority of the House of Lords in that case has stated as follows at p. 80 :—"Now the liability in tort of the owner of premises to those who use them is carefully discussed in the case of *Latham* v. *R. Johnson and Nephew* (7) and the statement of law there is a concise and accurate expression of well-known principles." Thus, it is clear that the decision in *Latham's case* (7) in which *Cooke's case* (1) was referred to as an extreme case, was approved of by the House of Lords. It therefore follows that the learned Judge was wrong in regarding that in *Cooke's case* (1) the House of Lords overruled all the earlier cases. If then it is clear that *Cooke's case* (1) and *Taylor's case* (9) proceeded on the doctrine of allurement

1. (1909) A C 229.
6. (1922) A C 74.
7. (1912) 1 K B 398.
9. (1922) 1 A C (H of L) 44.

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Srinivasa Aiyangar, J.

and not on any principle of law which had the effect of overruling all the earlier cases in English Reports which recognised the possibility of contributory negligence on the part of children, it is significant that the learned Judge himself considers that the doctrine of allurement could not possibly apply to the present case. He says "The only thing that could possibly be described as an allurement here is the mere invitation to take the short-cut, by leaving the wicket-gate unlocked which gave access to the Company's premises. A short-cut is in a sense an allurement to every one, but I doubt if it is so in the sense in which that phrase is used in the cases." The learned Judge was obviously disinclined to regard the engine as a trap and finally concludes by formulating what he considers to be the law in the following words "To invite children to cross lines of railway over which trains run is to expose them to the danger of being run over by a passing train or engine which must be apparent to the railway authorities and is not apparent to a child." I am unable to understand how from regarding the girl who is the plaintiff in this action as a mere licensee, the learned Judge insensibly passed on to regard her and refer to her as an invitee. By no stretch of English language could the plaintiff in this case be regarded as an invitee, and when the learned Judge speaks of an engine as a danger not apparent to a child, I must take it that he means in the present case he regards the plaintiff as a child to whom a running engine was not an obvious danger. I regret it is not possible to agree with the learned Judge when he says that. But if indeed the plaintiff was so young as not to realise that a running engine was an obvious danger, we are only relegated back to the dilemma and compelled to hold that the plaintiff had no right whatever to be there and that her parents had no right whatever to allow her to be there. For, adopting words which were used by the learned Judge himself in another place we might say that the appellant Railway Administration while allowing persons of ordinary intelligence to cross a line of rails cannot be supposed to have licensed them not to look and see whether there was an approaching engine or train before they stepped on the track.

For these reasons I have reluctantly come to the conclusion that the decree in favour of the plaintiff-respondent could not be supported and I therefore agree with my Lord Chief Justice that the appeal should be allowed. As I have also found negligence on the part of the Railway Administration, I

Madras & Southern Mahratta Railway Co., Ltd. v. Jayammal.

Srinivasa Aiyangar, J.

agree the more readily, that there should be no costs allowed to either party.

In conclusion I feel bound to state that though I have felt compelled to uphold the law as I understand it and find it and allow the appeal, I agree entirely with the learned Officiating Chief Justice that it is eminently a case in which the appellant Railway Administration in consideration of the infant plaintiff crippled and maimed for life by the accident, would now that their legal liability has been declared against, see their way out of common humanity to make suitable provision for her. In the case of *Stiefsohn* v. *Brookebond Company* (14) the Counsel on behalf of the defendant Company stated that irrespective of the decision of the Court the defendants would compensate the child for the injuries sustained, and I only trust that the learned Counsel in this case for the Railway Company would be in a position to make a similar announcement.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Thelikicherla Kandala Appalacharyulu *alias* Venkata Charyulu ... *Appellant** (*Plaintiff*)

v.

Thelikicherla Kandala Venkata Ramanujacharyulu (minor) by guardian Ranganayakamma and others ... *Respondents* (*Defendants* 3, 1 *and* 2).

Appalacharyulu v. Venkata Ramanujacharyulu.

Evidence—Document—Loss of—Proof of—Hearsay evidence—Admissibility.

To prove that a document had been lost, the third defendant produced a registration copy of it and relied upon a statement of his third witness that one *D* had stated that the document had been lost during a fire some years before. *D* was actually present in Court but he was not examined by the third defendant.

Held, that the registration copy could not be received in evidence, as there was no proof of the loss of the original document.

Second Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 101 of 1921 (A. S. No. 164 of 1921 on the file of the District Court of Godavari) preferred against the decree of the Court of the Principal District Munsif of Rajahmundry in O. S. No. 5 of 1919.

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*S A No. 582 of 1922. 18th September, 1924.

14. 5 Tim. L. R. 684.

Appala-charyulu v. Venkata Ramanuja-charyulu.

C. Rama Rao for appellant.

P. V Vallabhacharyulu for respondents.

The Court delivered the following

JUDGMENT :—The only point argued in this Second Appeal is that the Subordinate Judge erred in relying upon hearsay evidence for the proof of the loss of the original Ex. XIII. Plaintiff claims as reversioner of one Ramanujachary. 3rd defendant is the son of the alleged adopted son of Ramanujachary and the adoption is said to have been made after his death by his widow. The will is said to have been executed by the testator in 1873 and was registered five months after his death in 1874 and the plaintiff contended that the will was a forgery. The defendant produced a registration copy of the will and relied upon a statement of his third witness that Doddayacharlu had stated that the will had been lost during a fire some years before. Upon this evidence he relied for the purpose of adducing secondary evidence of the will. The District Munsif held that the evidence adduced for the loss of the document was only hearsay evidence and rejected Ex. XIII on the ground that the loss of the original had not been sufficiently accounted for. On appeal, the Subordinate Judge held that in a case like this hearsay evidence would be admissible for the purpose of proving the loss of the original and exhibited Ex. XIII and dismissed the plaintiff's suit. If the original of Ex. XIII was proved no doubt it would have shown that the adoption was made under the authority of the testator. But that fact having been directly challenged, it was the duty of the 3rd defendant to have adduced satisfactory evidence that the original of Ex. XIII was lost. He contended himself by examining a witness who stated that they heard Doddayacharlu say that the will was lost. Doddayacharlu was actually present in Court but he was not examined by the 3rd defendant. It is now argued before me that as he was an adverse witness he could not have been examined to prove the loss of the document. It is very difficult to follow this argument for Doddayacharlu was the father of the adopted boy and 3rd defendant is the son of the adopted boy. That being so it is very difficult to see how the paternal grandfather could have refused to speak the truth in favour of his grandson. But apart from that, whether his evidence is reliable or unreliable, the question is whether hearsay evidence can be adduced for the purpose

Appala-charyulu v. Venkata Ramanuja-charyulu.

of proving the loss of a document. The Subordinate Judge relies upon a passage in Taylor on *Evidence* which has no application to the present case. Doddayacharyulu was in possession of the document according to 3rd defendant and he was alive on the date when the case was tried before the District Munsif and there is no reason why hearsay evidence should have been admitted. No doubt the statement of a deceased person is admissible under S. 32 of the Evidence Act. If it fulfils the conditions therein laid down it does not permit any hearsay evidence to prove a thing which could be proved by a person who is cognisant of it, or, in other words, where direct evidence is available hearsay evidence is not at all to be admitted. That being so, Ex. XIII cannot be received in evidence and if Ex. XIII is expunged from the records, there is no proof that the adoption was made under the authority of Ramanujacharyulu.

The judgment of the Subordinate Judge, which is based entirely on documents inadmissible in evidence, cannot be supported. I reverse the judgment of the Subordinate Judge and restore that of the Principal District Munsif with costs in this Court and the lower Appellate Court.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE JACKSON.

Gooty Agraharam Subramanian and another *Appellants** (*Defdts.* 1 *and* 2)

v.

Agraharam Ramachandra Rao *Respondent* (*Plff.*).

Subramanian v. Ramachandra Rao.

Hindu Law—Partition—Partial partition—Suit for—Maintainability—Properties not included in suit in hands of tenants of plaintiff.

In a suit for partition the plaintiff omitted to include in his plaint several lands belonging to him and the defendants which were in the possession of tenants to whom the plaintiff had himself leased the lands before date of suit.

Held, that the suit was bad for partial partition but that it ought not to be dismissed on that ground.

Opportunity was given to the plaintiff to amend his plaint.

Second Appeal against the decree of the Court of the Subordinate Judge of Anantapur in A. S. No. 130 of 1920,

*S A No. 343 of 1922. 6th August, 1924.

Subramanian v. Ramachandra Rao.

preferred against the decree of the Court of the District Munsif of Gooty in O. S. No. 90 of 1918.

K. Kameswara Rao for appellants.

B. Somayya for respondent.

The Judgment of the Court was delivered by

Devadoss, J.

DEVADOSS, J. :—The only point argued in this second appeal is that the suit is not maintainable as it does not embrace all the properties belonging to the plaintiff and defendants Nos. 1 and 2.

The plaintiff admits in his evidence that there are several lands belonging to him and the defendants which are in the possession of tenants, that he himself had leased the lands before the date of suit and that the income from the lands was payable to himself as well as to defendants Nos. 1 and 2.

The District Munsif held that the suit was maintainable and the Subordinate Judge dismissed the appeal of the defendants on the ground that the suit was maintainable. We are clearly of opinion that this is not a case in which there was any inconvenience or difficulty in the way of including the other lands belonging to the plaintiff and the defendants among the properties to be divided in the suit. If some property belonging to the plaintiff and the defendants was in the hands of a third party claiming adversely to them, or if some property was alienated by one of the co-sharers and if there was some difficulty in including such alienee in the suit, then it may be that the Court would not be inclined to hold that such properties should be brought into the suit. But in this case no such difficulty is alleged to exist. On the other hand the only allegation is that the other properties are in the possession of the tenants of the plaintiff. It was held in *Rajendra* v. *Brojendra* (1) that a suit for partial partition would not ordinarily lie. In *Pakkiri Kanni* v. *Manjoor Saheb* (2) a Bench of this Court held that in certain cases partial partition may be allowed but there must be circumstances which militate against the division of all the family properties and which would be a sufficient reason for the Court to hold that the suit for partial partition should be allowed. But in this case no such circumstances have been brought to our notice. There is no reason why the plaintiff

1. (1922) 37 C L J 191. 2. (1923) I L R 46 M 844.

Subramanian v. Ramachandra Rao.

Devadoss, J.

should not have included all the properties belonging to himself and the defendants in his prayer for partition.

In the circumstances we allow the appeal of the defendants; but at the same time we do not think that the suit of the plaintiff should be dismissed on this technical ground. We allow him an opportunity to amend his plaint within two months from to-day. He will pay the costs of the defendants throughout; and the District Munsif will allow the amendment only after he pays the amount of costs to defendants 1 and 2. If he does not amend the plaint the suit will stand dismissed with costs throughout.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE MADHAVAN NAIR.

Ananjaperumal Konar (dead) and another — *Appellants* (Plaintiff and L. R. of the plaintiff)*

v.

Pichamuthu Nadar and another — *Respondents (Defendants).*

Ananjaperumal Konar v. Pichamuthu Nadar.

Contract Act, S. 74—Penalty—Compound interest at same rate as simple interest—Stipulation to pay—Mortgage—Decree for sale—Direction that certain items should be sold first—Propriety—Conditions.

A stipulation by a borrower to pay interest on default of payment of interest at the same rate at which he contracted to pay interest on the principal sum is not a penalty under S. 74 of the Contract Act.

A mortgagee is entitled to proceed against all or any of the items of the mortgaged properties, and, in the absence of special circumstances, the Court is not, in a suit to enforce the mortgage, entitled by its decree to direct that certain items should be sold before the other items.

Second Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in A. S. No. 6 of 1921, preferred against the decree of the Court of the District Munsif of Srivaikuntam in O. S. No. 434 of 1920.

C. Krishnamachariar for appellants.

N. Subramanyam and *S. Balasingam Satya Nadar* for respondents.

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*S A No. 162 of 1922. 26th September, 1924.

Ananja-perumal Konar v. Pichamuthu Nadar.

Devadoss, J.

The Judgment of the Court was delivered by

DEVADOSS, J. :—The main point argued in this second appeal is whether a stipulation to pay compound interest on default of payment of interest is penal.

The District Munsif decreed the plaintiff's suit. On appeal by the 1st defendant the Subordinate Judge relying upon a decision of this Court reported in *Venkataramiah Pillai* v. *Subramania Pillai* (1) held that the stipulation to pay compound interest was penal and allowed the plaintiff's claim for interest at 24 per cent. per annum and the plaintiff has preferred this second appeal.

The question is whether a bare stipulation to pay compound interest on default of payment of interest is penal. The respondent's vakil concedes that if a low rate of interest is provided for in the bond the stipulation to pay compound interest on default of payment of interest would not be penal.

A bare stipulation to pay compound interest is not penal within the meaning of S. 74 of the Contract Act. Compound interest is paid in many business transactions and the borrower who undertakes to pay the interest on the loan on a due date is bound to pay it and if he does not pay it any stipulation to pay interest on such interest, is not a penalty. The decisions of this Court have been uniform on this question that a bare stipulation to pay compound interest at the rate provided for in the bond, on default of payment of interest is not a penalty. [Vide *Veera Reddi* v. *Subbanna Reddi* (2) and *Venkatachallam Chettiar* v. *Veerannan Ambalagarar* (3)]. But a Bench of this Court consisting of the Officiating Chief Justice, Sir Abdur Rahim and Seshagiri Aiyar, JJ. held in a case reported in *Venkataramaiah Pillai* v. *Subramania Pillai* (1) that a " provision for payment of compound interest may be a penalty within the meaning of S. 74 of the Contract Act and it makes no difference in principle whether the interest is payable on default at a higher rate or at the same rate. " The learned Judges rely upon a decision of the Privy Council in *Sundar Koer* v. *Rai Sham Krishen* (4) and a decision of a Bench of the Calcutta High Court reported in *Khagaram* v. *Ramsankar Das Pramanick* (5). In *Sundar Koer* v. *Rai*

1. (1916) 37 I C 799. 2. (1910) 8 M L T 387. 3. (1912) M W N 512.
4. (1906) I L R 34 C 150. 5. (1914) I L R 42 C 652.

Ananja-perumal Konar v. Pichamuthu Nadar.

Devadoss, J.

Sham Krishen (4) their Lordships do not hold that stipulation to pay interest on interest on default of payment of interest is penal. They observe at page 158 :—" Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty." The decision of the Privy Council is contrary to the view taken by the learned Officiating Chief Justice in *Venkataramaiah Pillai* v. *Subramania Pillai* (1) and the decision in *Khagaram Das* v. *Ramsankar Das Pramanick* (5) does not support his view. Mr. Justice Mookerjee observed at page 658 :—" Before we examine this argument in the light of judicial decisions, it is desirable to point out, that in the solution of this question, no real assistance can be derived from the class of cases, in which there is a stipulation for payment of interest at an advanced rate on default of payment of principal or interest on the due date or other classes of cases in which, on default of payment of principal or interest stipulation is made for payment of compound interest at the same rate as the simple interest originally agreed to be paid or at a higher rate." With all respect to the Officiating Chief Justice we fail to see how this Judgment of the Calcutta High Court supports the view he has taken. The other learned Judge Seshagiri Aiyar, J., was a party to the decision in *Ghantasalla Seetharamiah* v. *Tadepalli Pitchayya and others* (6). There sitting with Sadasiva Aiyar, J., he held following *Sundar Koer* v. *Rai Sham Krishen* (4) that a provision for payment of compound interest was not penal by itself but a provision for compound interest at an appreciably higher rate than the rate mentioned as payable till default might be penal. The decision in *Venkataramaiah Pillai* v. *Subramania Pillai* (1) was dissented from a Bench of this Court in *Malli Chettiar* v. *Veerannathevan and others* (7) and Mr. Justice Ayling and Mr. Justice Odgers held that the stipulation to pay compound interest from the date of default at the same rate as simple interest was not a penalty within S. 74 of the Contract Act. Where a borrower undertakes to pay interest on default of payment of interest at the same rate at which he contracted to pay interest on the principal sum, it

1. (1916) 37 I C 799.
4. (1906) I L R 34 C 150.
5. (1914) I L R 42 C 652.
6. (1914) 28 I C 859 at 860
7. (1921) 41 M L J 470.

Ananjaperumal Konar v. Pichamuthu Nadar.

Devadoss, J.

is not a penalty under S. 74 of the Contract Act. That being so, we think the decree of the Subordinate Judge was wrong in disallowing compound interest as claimed by the plaintiff.

The Subordinate Judge has decreed that certain items, *i. e.*, items 2, 4 and 5 should be proceeded against first by the mortgagee. The mortgagee is entitled to proceed against all or any of the items he chooses. We do not think it was open to the lower Court to direct him to proceed against certain items in the first instance, in the absence of circumstances which would justify that order.

We do not think there is any evidence in the case to justify that order. The 2nd defendant has not chosen to put forward any defence.

In the result, the Second Appeal is allowed and the judgment of the Subordinate Judge set aside and that of the District Munsif restored.

As regards costs, the appellant will get his costs both here and in the Lower Appellate Court from the 1st defendant. Time for redemption six months.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Srinivasa Aiyangar *Appellant* (L. R. of the plaintiff)*

v.

Vellayan Ambalam *Respondent (Defendant).*

Srinivasa Aiyangar v. Vellayan Ambalam.

Civil Procedure Code of 1908, *S.* 64—*Alienation pending attachment—Void or voidable—Mortgage—Extinguishment—Intention of parties—Limitation Act, Arts.* 137, 138—*Execution purchaser—Suit for possession of property purchased—Limitation—Starting point.*

In a suit for redemption, the plaintiff claimed to be entitled to the suit property under a purchase thereof by him from the purchaser of the same in execution of a Small Cause decree obtained against *V*, the then owner of the property. The auction sale held on 13th July, 1891, was confirmed on 14th September, 1891. While the property was under attachment, *V* mortgaged it to the predecessor-in-title of the defendant on 15th June, 1891. The mortgagee had paid off a prior *othi* existing on the property. The circumstances of the case showed that the prior *othi* was not kept alive at the time when the mortgage to the defendant's predecessor-in-title was executed.

Held, that the mortgage to the defendant's predecessor-in-interest made pending attachment was void under S. 64, Civil Procedure Code ; that the purchaser at the sale in execution of the decree having become entitled to possession of the property at the time of the sale and no suit having been brought

*S A No. 404 of 1922. 19th September, 1924.

Srinivasa Aiyangar v. Vellayan Ambalam.

by him within 12 years after the sale, the plaintiff's suit was barred under Art. 137 or 138 of the Limitation Act; and that the plaintiff could not take advantage of the prior *othi* for purposes of the suit.

Second Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in A. S. No. 14 of 1921 (A. S. No. 568 of 1919 on the file of the District Court of Ramnad) preferred against the decree of the Court of the District Munsif of Manamadura in O. S. No. 97 of 1918.

K. Bhashyam Aiyangar and *S. Krishnaswami Aiyangar* for appellant.

T. V. Muthukrishna Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The plaintiff's suit is for redemption. The plaint mentioned land belonged to one Venkataranganatha Naicker. It was sold in execution of a Small Cause decree against him and the plaintiff obtained it under a sale from one Tavazi Ambalam, whose father purchased it from the auction purchaser. The auction sale held on the 13th of July, 1891, was confirmed on the 14th of September, 1891. While the property was under attachment, the owner of the property mortgaged it to the predecessor-in-title of the defendant on the 15th June, 1891, under Ex. I. The mortgagee under Ex. I had paid off a prior mortgage existing on the property. The Subordinate Judge held that the mortgage under Ex. I was void under S. 64, Civil Procedure Code, that the defendant, the assignee of the mortgage interest, prescribed for an absolute title to the property, that the prior mortgage which was paid off by the defendant did not subsist at the time of Ex. I and that the plaintiff's suit was barred by limitation. He therefore dismissed the plaintiff's suit.

It is argued by Mr. Bhashyam Aiyangar on behalf of the plaintiff (appellant) that the Subordinate Judge's decision that the defendant had prescribed for an absolute title to the property is wrong, that the alienation of the suit property made while the attachment was pending is only voidable at the option of the plaintiff, that the present suit cannot, therefore, be considered to have been barred by limitation and that, at any rate, since the prior *othi* was paid off by the mortgagee under Ex. I, the plaintiff could sue for the redemption of that *othi*.

Mr. Muthukrishna Aiyar appearing for the respondent has not tried to support the decision of the Subordinate Judge that the mortgagee under Ex.I could, if the mortgage is invalid,

Srinivasa Aiyangar v. Vellayan Ambalam.

prescribe for an absolute title and, therefore, the cases cited by the appellant, namely *Gopal Dasu* v. *Rami* (1) and *Ayisa Bivi Ammal* v. *Kalandarasa Rowther* (2) and *Nadepena Appamma* v. *Chinnaveadu* (3) against the decision of the Subordinate Judge on that point need not be considered.

The real question for decision is whether the plaintiff's suit is barred by limitation. The argument for the respondent is that the mortgage made pending the attachment in this case is void as against all claims enforceable under the attachment, and, since no suit was instituted by the plaintiff or his predecessor-in-interest within the twelve years' period allowed either under Art. 137 or Art. 138 of the Limitation Act, the present suit is barred by limitation. S. 64, Civil Procedure Code, says in effect that "private alienation of property after attachment shall be void as against all claims enforceable under the attachment." The cases brought to my notice by the learned Vakil for the appellant to show that such alienations are only voidable do not really support his argument and can all be explained with reference to their special circumstances. In *Gangayya* v. *Venkataramayya* (4) the attaching decree-holder had agreed for a consideration with the purchaser of an item of the attached property that he would not bring that item to sale in execution of the decree. With reference to this special circumstance, the learned Judge pointed out that S. 64, Civil Procedure Code, is really one intended to benefit decree-holders but that benefit being for the decree-holder he could waive the benefit. In that case it was held that, "as the decree-holders had entered into an actual contract with the purchaser, they cannot be permitted to go back upon their contract and insist upon the application of S. 64 in their favour. To allow them to do so would be clearly to perpetrate a fraud." In view of this explanation this decision does not support the appellant. The decision in *Gosta Behari* v. *Sankar Nath* (5) is also distinguishable. It decided that a transferee from the judgment-debtor of immoveable property attached in execution of a decree becomes the owner of the property and is competent to make an application under R. 89 of O. 21, Civil Procedure Code, for cancellation of the sale in execution of the decree. It does not say that a private alienation of property pending attach-

1. (1921) I L R 44 M 946 : 41 M L J 194.
2. (1924) 46 M L J 501.
3. (1923) 45 M L J 667.
4. (1922) 44 M L J 80.
5. (1916) 36 I C 510 at 511.

Srinivasa Aiyangar v. Vellayan Ambalam.

ment is not void as against all claims enforceable under the attachment. The learned Judges who decided the case took special care to point out that " In the case before us there is no question of protection to the decree-holder or the enforcement of the claim under the attachment ;" and they proceed to say, " The effect of the application under R. 89, if granted, is forthwith to satisfy the entire decree. It may be that, in some instances, the effect is to place the decree-holder in a better position than he occupies under an execution sale. Consequently, by no stretch of language can it be said that, when an application is made in conformity with R. 89, any question arises as to a claim enforceable under the attachment within the meaning of S. 64." The decision in *Mariappa Pillai* v. *Raman Chettiar* (6) cited to show that the word 'void' in S. 36 of the Provincial Insolvency Act means only 'voidable' cannot, in my opinion, be relied upon in support of the appellant's argument ; for that decision as well as the other decisions referred to in it proceed on the analogy of the English Bankruptcy Act and also upon the consideration that the Act makes the intervention of the Court necessary to set aside an alienation which would not be so if the transfer were void *ab initio*. The observations of their Lordships of the Privy Council in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (7) also support the view that a private alienation of property pending attachment is wholly void against all claims enforceable under the attachment. Their Lordships observe that " so far as the mortgage for Rs. 40,000 prejudiced the execution-creditor, it is void as against him but the second does not render void transactions which in no way prejudice him." In these circumstances, I hold that the alienation in this case, Ex. I, made pending attachment is void under S. 64, Civil Procedure Code. The purchaser at the sale in execution of the decree having become entitled to possession of the property at the time of the sale and no suit having been brought by him within twelve years after the sale, the plaintiff's present suit is barred by limitation under Art. 137. If Art. 138 is the article applicable, even then twelve years had expired after the date of sale and the plaintiff's suit is barred by limitation.

The mortgage being void, the next question for consideration is whether the prior *othi* paid off by Perumal Naidu, the defendant's predecessor-in-interest and the mortgagee under Ex. I, is alive for his benefit. It is to be observed that that it

6. (1918) I L R 42 M 322. 7. (1901) I L R 29 C 154 at 166: 12 M L J 73 (P C).

should be considered to have been kept alive for the benefit of Perumal Naidu is argued not by the defendant but by the plaintiff. The circumstances of the case clearly show that there was no intention on the part of the mortgagee to keep the prior *othi* alive. The Court sale was not subject to any prior encumbrance. It is not clear when the prior mortgage of 1887 was actually paid off ; but that it did not subsist at the time of Ex. I is clear as it was already discharged by a portion of the consideration for Ex. I. The document Ex. I says, " I have given the above land on *othi* to you including the right to both varams and taken the consideration amounts as detailed hereunder the *othi* amount of Rs. 280 *has been paid by you to Venkatachallam Pillai* in respect of the *othi* made by me on the 3rd of February, 1887 last on the said land and the amount received by me in cash. ". We know only this, viz., that Rs. 280 was paid by the mortgagee to Venkatachallam Pillai. The circumstances under which it was paid and the time when it was actually paid are not disclosed by the evidence. The question being primarily one of intention—(see *Gokaldas* v. *Purānmal Premsukhdas* (8)]—I do not think the Subordinate Judge was wrong in coming to the conclusion from the circumstances of the case that the prior *othi* was not kept alive at the time when Ex. I was executed. In this view, it follows that the plaintiff could not take advantage of the prior *othi* for purposes of this suit.

No other question was argued before me by the learned Vakil on behalf of the appellant. As the plaintiff's suit is barred by limitation, I dismiss this second appeal with costs.

A. S. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Villuri Jagannadham Naidu *Petitioner* (Accused)*

v.

Ch. Rama Rao, Sanitary Inspector, Anakapallee *Respondent (Complainant.)*

Madras District Municipalities Act (V of 1920) Ss. 3 (21), 180, 347 *and* 362 *—Buttress wall projecting into municipal street—Prosecution for under S.* 180*— Alteration of charge into one under S.* 362*—Limitation for prosecution—Offence committed.*

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*Cr. R. C. No. 437 of 1923. 1st February, 1924.
Cr. R. P. No. 339 of 1923

8. (1884) I L R 10 C 1035 (P C).

Jagannadham v. Rama Rao.

A person built a buttress wall to his compound wall and that projected into the municipal street adjoining it. He was prosecuted therefor under S. 180 of the Madras District Municipalities Act, but as the complaint was filed more than 3 months after the encroachment, the charge was altered into one under S. 362 of the same Act. *Held,* the erection of the buttress wall encroaching upon the land by the side of a municipal street, even though it is uncovered by any pavement or other structure would be an encroachment on the street and as such punishable under S. 180 of the Act, but it would not be an offence under S. 362 which has nothing to do with encroachments. Whether the offence was one under S. 180 or under S. 362, a prosecution launched more than 3 months after the encroachment was barred under S. 347 of the Act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Vizagapatam, in Criminal Appeal No. 4 of 1923, preferred against the judgment of the Court of the Second Class Magistrate of Anakapallee, in C. C. No. 391 of 1922.

P. V. Rangaram for petitioner.

K. Aravamuda Aiyangar for respondent.

The Court made the following

ORDER :—In this case, the petitioner has been convicted under Ss. 362 and 313 of the District Municipalities Act, V of 1920 and sentenced to pay a fine of Rs. 15 with two weeks' simple imprisonment in default. The facts found on which he has been convicted are that he built a buttress wall to his compound wall, which projected on to the municipal street adjoining it. This was no doubt an encroachment. Taking the definition of the word " street " in S. 3, cl. (21), encroachment upon the land by the side of a street, even though it is uncovered by any pavement or other structure, would be an encroachment on the street. S. 180 would certainly apply to this case. But the lower Courts, though the accused was first charged under S. 180, have altered the charge, because of the difficulty of the limitation of three months, within which the prosecution has to be started, for an offence under S. 180 to one under S. 362 of the District Municipalities Act. It is clear that S. 362 cannot apply to this case, but that S. 180 is the section that really applies. S. 362 deals with the removal of earth, sand or other materials or depositing such materials or making such encroachments by depositing such materials on land, river, estuary, canal, backwater or water course. It has nothing to do with encroachments on streets. It is not denied in this case that the prosecution under S. 180 must fail, on the ground

Jagannadham v. Rama Rao.

of limitation. Even if S. 362 were to apply, it seems to me that the prosecution will still fail, under the three months' rule as the proviso to S. 347 does not seem to deal with a case under S. 362 at all. The proviso deals with failure to take out a license, obtain permission, or to secure registration for doing certain things for which a license, permission or registration is required. The accused is not prosecuted for any failure to take out any license or obtain permission or secure registration. He has been prosecuted for encroaching upon a municipal street by building buttress wall to his compound wall. The case against him therefore fails on the ground of limitation and should have been dismissed. What exactly the Municipality should do, for the purpose of getting the encroachment on the street removed, will be for its own legal advisers to advise.

This petition is allowed, the conviction is set aside and the fine, if paid, will be refunded.

T. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Garapati Butchi Seethayamma *Appellant* in the appeal sought to be preferred to the High Court against the decree of the Additional Sub-Court of Cocanada in O. S. No.* 33 *of* 1920.

Seethayamma, *In re.*

Court Fees Act (VII of 1870), *S.* 7 (*v*) *and Sch. I, Art.* 1—*Suit by a member of a joint Hindu family to avoid a sale of ancestral property and for possession of his share—Suit decreed on condition of payment of a certain sum of money—Appeal by defendant—Court-fee payable.*

Where the plaintiff, a member of a joint Hindu family, sued for possession of his half share of the family lands alleged to have been improperly alienated by the manager, the Court below decreed the suit on condition of the plaintiff paying Rs 12,000 to the alienee defendant. On an appeal by the defendant claiming that the suit should have been dismissed *in toto, held,* that the appellant was bound to pay Court-fee only on the value of the lands decreed to the plaintiff, such value to be ascertained in the manner prescribed by S. 7 (*v*) of the Court Fees Act. *Rup Narain* v. *Bishwanath Singh,* (1922) I L R 44 A 629 relied on.

Case referred under S. 5 of the Court-Fees Act by the taxing officer of the High Court in respect of the amount of Court-fees

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*S R No. 12004 of 1923. 4th April, 1924.

Seethayamma, *In re.*

payable on the memorandum of appeal sought to be preferred to the High Court against the decree of the Court of the Additional Subordinate Judge of Cocanada in O. S. No. 33 of 1920.

G. Lakshmanna and *V. Viyyanna* for appellant.

The Government Pleader (*C. V Ananthakrishna Aiyar*) for the Crown.

The Court delivered the following

JUDGMENT :—This is a reference under the Court Fees Act that has been referred to me for disposal by the learned Chief Justice, the Taxing Officer having referred the matter for the decision of the Court. In this case the plaintiff obtained a decree so far as the 11th defendant, the appellant before me is concerned, for the recovery of possession of a half share of the lands sold to him under Ex. V by his father on payment of Rs. 12,000. The appellant's appeal asks this Court to hold that the plaintiff is not entitled to the lands at all and that the suit should be dismissed as against the appellant. The question raised is what is the Court-fee that the appellant has to pay on his appeal. No doubt as Sir Kumaraswami Sastri, J., has remarked in *In re, Porkodi Achi* (1)at p. 256 : "The current of authority is clearly in favour of the view that the value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted by the decree which a party wishes to get rid of." Turning to the Court Fees Act, we find the governing rule applicable to appeals is the one in Sch. I, cl. 1 of the Act. It says, leaving out the unnecessary words, the proper fee payable upon a memorandum of appeal not otherwise provided for in this Act, presented to any Civil Court except those mentioned in S. 3 with which we are not concerned, is to be calculated on the amount of value of the subject-matter in dispute. The way in which the fee is to be fixed is by taking " the amount of value of the subject-matter in dispute." The question before me therefore really turns upon the interpretation to be put upon the expression " the subject-matter in dispute" and "its value."

Turning to S. 7, cl. 5 of the Court Fees Act we find that " in suits for the possession of land, houses and gardens the Court-fee is to be calculated according to the value of the subject-matter." The same words " the value of subject-matter" are used there, and it says " such value shall be deemed to be" in the various cases referred to as mentioned in clauses (*a*) to

1. (1921) I L R 45 M 246: 41 M L J 587.

Seethayamma, *In re.*

(*e*). In the absence of any guiding rule in the Act itself as to computing the value in appeal I think it is proper to take the "value of the subject-matter" in Schedule 1, cl. 1 as meaning the same thing as "the value of the subject-matter" as set out in various sub-clauses of clause 5, S. 7.

It is contended, however, before me that the subject-matter in dispute in this appeal is not the land but the market value of the land reduced by Rs. 12,000 which had already been declared as payable to the appellant. I am unable to accede to this argument. In my view the subject-matter of the appeal is the land itself, as the appellant is seeking to get rid of a decree against him which has given the respondent the right to recover the possession of the land from him. He does not seek to get the amount which the lower Court has directed to be paid to him increased by any sum of money in which case no doubt the difference between what he claims in appeal and what the lower Court has granted to him would be the subject-matter of the appeal. But here what the appellant claims is the land itself and his contention in appeal is that the land should not be taken away from him under any circumstances. He is not asking in the appeal, that the condition laid down by the lower Court should in any way be varied. But he wants the suit itself to be dismissed as regards the claim for the land in his possession is concerned. Such being his prayer in appeal I must hold that the land itself is the subject-matter of the appeal and for purposes of valuation the rule laid down in S. 7, cl. 5, in various clauses as applying to the various immoveable properties, lands, houses and gardens should be applied in this case. The lands here are partly inam lands and partly jirayati lands, and therefore they will have to be valued under cls. (*a*) and (*b*). This view is not in conflict with the views expressed in the cases cited to me. On the other hand it is supported by the view expressed by Mr. Justice Piggott in *Rup Narain and others* v. *Bishwanath Singh* (2). The learned Judge says at page 632 :—"The position of the appellants is different. Even on the principle suggested by the Stamp Reporter, the report is unjust to them for the *ad valorem* fee would require to be calculated on Rs. 10,000 *less* Rs. 4,000 which the plaintiff has been ordered to pay, *i. e.*, on Rs. 6,000. I think, however, that they are entitled to appeal against the decree as it stands and to value their appeal for the purposes

2. (1922) I L R 44 A 629.

Seethayamma, *In re.*

of the Court Fees Act under S. 7 (5) (*a*) of the said Act. The appeal there was similar to the appeal here. The suit was brought by a member of a joint Hindu family to avoid the sale of a joint property by one of the members of the family and to recover his share from the property. The lower Court had granted a decree to the plaintiff, subject to the payment of Rs. 4,000 by him to the defendants who were the alienees. Those defendants (appellants) contended that the decree was not correct and the suit should be dismissed and they were entitled to keep the lands. The learned Judge held that in such an appeal the defendants should value their appeal for the purposes of Court-fees under S. 7 (5) (*a*) of the Act. quite irrespective of the conditions imposed by the decree on the plaintiff to recover the land. If the plaintiff in the present case before me had appealed and contended that the amount of Rs. 12,000 was too large and that it should be reduced by any particular amount, no doubt the subject-matter of the dispute in the appeal would be the difference between what he admits is due and what the lower Court has declared to be due. But it is the defendant that appeals in the present case and he seeks to have the decree of the lower Court, which directed the possession of the lands to be given to the other side, set aside. It is clear in such a case that the subject-matter of the appeal is the land and not any money ; and therefore as the Court Fees Act directs a certain method of valuation to be adopted in cases where the subject-matter in dispute is land, that method should be adopted in this case. I direct that the Court-fees be paid on such a valuation. The appellant will be given time for one week after the reopening to pay the extra Court-fees.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Ramaswami Nayakar and another *Appellants** (*Plffs.*)

v.

Meenakshisundaram Chettiar and others *Respondents* (*Defendants*).

Ramaswami Nayakar *v.* Meenakshisundaram Chettiar.

*Torts—Trespass—Damages—Assessment of—Considerations for Court—*Animus *of trespasser—Laches of plaintiff—Effect.*

In an action for trespass, the damages awardable against a wilful trespasser ought in no case to be less than the amount, for which having regard to all the circumstances, a prudent and reasonable owner would have agreed to let

*S A Nos. 233 to 235 of 1921, 26th August, 1924.

the land, or less than the amount the trespasser would have had to pay as the result of reasonable negotiations for the use and occupation of the land. Over and above this minimum amount, the *animus* with which a trespasser commits the wrong may be taken into consideration for the purpose of awarding higher damages than would otherwise have been. But a plaintiff who stands by and virtually encourages the wrong, instead of preventing the same, is not entitled to damages on the same scale. *Williams* v. *Currie*, 135 E R 774 and *Jegon* v. *Vivian*, (1870) 6 Ch 742 referred to.

Second Appeals against the decrees of the Court of the Additional Subordinate Judge of Ramnad, at Madura, in A. S. Nos. 66, 67 and 68 of 1919 respectively, preferred against the decrees of the Court of the Additional District Munsif of Srivilliputtur, in O. S. Nos. 213 of 1916, 428 of 1917 and 440 of 1917.

The Advocate-General (*T. R. Venkatrama Sastriar*) for appellants.

K. Rajah Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The question raised in this Second Appeal relates to the principle on which damages should be awarded for trespass on land and the proper measure of such damages. The plaintiffs-appellants are the owners of about 2 1|2 acres of land, on which and several other adjoining lands a cattle-fair used to be held annually. The predecessor-in-interest of the plaintiffs would appear to have been content to let this land, for the purpose of the fair, receiving the sum of Rs. 50 as rent every year. But from about the year 1911, the plaintiffs refused to let the land on the same rent. For the years 1911 and 1912 the plaintiffs obtained, in a decree *ex parte*, damages against the defendants, at Rs. 300 per annum, for trespass on the suit land, consisting in their using the land for the cattle-fair, without any agreement with the plaintiffs and without their permission. In the first two suits, the plaintiffs have claimed from the defendants damages at the rate of Rs. 300 per annum, for two years, in each of the suits and in the last suit, Rs. 550 as damages for one year. The Court of first instance granted to the plaintiff damages at Rs. 50 per annum and the Lower Appellate Court has confirmed the same. The learned Advocate-General for the appellant has argued that the principle on which the lower Courts awarded damages only at Rs. 50 per annum was wrong in law and that a different measure of damages should have been adopted. I am unable to understand on what particular principle the Lower Appellate Court proceeded to fix the damages

Ramaswami Nayakar v. Meenakshisundaram Chettiar.

at Rs. 50 per annum, apart of course from its statement of agreement with the Court of first instance in that matter. In one part of the judgment, it almost seems that the learned Subordinate Judge was inclined to adopt, as the true measure of damages, the number of cattle that were on the plaintiffs' land. At another place, he has indicated that if the accounts of the lessees could have been produced, that might have furnished to him a measure of damages he could have adopted. Reference is also made to the sum of Rs. 50 having been accepted by the plaintiffs' predecessor-in-interest, as rent as also to the said amount being reasonable rent, having regard to the rents charged in the neighbourhood. The amount of rent which the plaintiffs' predecessor were content to receive in previous years could possibly not be a measure of damages at any rate for the succeeding years. The rents paid or received in respect of the adjacent lands were the result of contracts. In *Williams* v. *Currie* (1) Justice Maule observes as follows "If we were to hold that the Jury in estimating the damages for an unlicensed trespass of this sort are to be restrained to exactly the amount of the injury sustained by the plaintiff, it would in effect be placing a wrongdoer upon precisely the same footing, as one who enters with permission." The learned Judge proceeds further to indicate that the wilfulness of an act of trespass and the trespass was done for the pecuniary benefit of the defendants would be matters to be taken into consideration in assessing damages. In the case of *Jegon* v. *Vivian* (2) before the House of Lords, the Lord Chancellor generally approves of the principle that in awarding damages a distinction may be made between a trespasser *bona fide* claiming a title and a wilful trespasser, and goes on to observe that the Court never allows a man to make profit by wrong. I do not, however, understand by the last statement that the wrong-doer is or should be placed exactly in the same position, as an agent or trustee and made to account for all the profits he has made. I construe that statement of the law merely to signify that a wilful trespasser should not be placed in a better position than a person who had to enter into an agreement with the landlord, in respect of the use or occupation of the land ; that is to say, in other words, the damages awarded against a wilful trespasser ought in no case to be less than the amount which, having regard to all the circumstances,

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1. (1845) 135 E R 774. 8. (1870) 6 Ch 742.

Ramaswami Nayakar v. Meenakshisundaram Chettiar.

a prudent and reasonable landlord would have agreed to let the land, for the purpose, or less than the amount, which the trespasser would have had to pay as the result of the reasonable negotiations for such use or occupation of the land. The amount so arrived at would be the minimum of damages awardable against him. Over and above that, there is high authority for holding that, as in the case of certain personal wrongs, the *animus* with which a trespasser commits the wrong may be taken into consideration for the purpose of awarding higher damages than would otherwise have been. In this case, I have no hesitation in holding that the trespass was wilful. I am bound therefore to award as and by way of damages to the plaintiffs in the circumstances, not only the reasonable amount which, if there had been negotiations between the parties, would have been fixed as rent but also a further amount for the wilfulness of the trespass. But at the same time, in the present case, there is the undoubted fact that the plaintiffs, knowing that the trespass was about to be or certain to be committed stood by and allowed such trespass to be committed year after year, in the undoubted hope that they would be able to recover from the defendants, the large amount of damages, for which they had obtained a decree *ex parte*, in the previous suit. The conduct of the plaintiffs, who complain of the wrong is an undoubted element to be taken into consideration, in awarding damages ; and I have no hesitation in laying it down that the plaintiffs, who stand by and virtually encourage the wrong, are not entitled to damages on the same scale, on which damages might be granted to a plaintiff, who had done his best to prevent the commission of the wrong. Taking all these circumstances into consideration, the conclusion I have arrived at is that the plaintiffs in this case, would be entitled in the first place to such amount as having regard to all the circumstances might be deemed to be the amount for which, on negotiations between the parties, the plaintiffs might have agreed to let and which the defendants might have agreed to pay, in respect of the suit land in the years in question, and in addition thereto such further damages for the wilfulness of the trespass, taking into consideration at the same time the conduct of the plaintiffs in not preventing the trespass, but standing by and allowing the trespass to be committed. The process is difficult of imagining the plaintiffs and the defendants coming together, negotiating reasonably and arriving at a reasonable amount of rent, but it has got to be done. I have

Ramaswami Nayakar v Meenakshisundaram Chettiar.

come to the conclusion that a sum of Rs. 100 per annum would represent such amount. I should have been disposed to grant, as and by way of further damages, for the wilfulness of the trespass, a sum of Rs. 50 per annum, but having regard to the plaintiffs standing by and allowing the trespass to be committed, with the ulterior object of claiming damages, I award only Rs. 25 in addition, for each year. In the result, instead of Rs. 50 per annum awarded by the lower Courts, I award Rs. 125 per annum. The decrees of the lower Courts will be varied accordingly in all the cases. The respondents will pay the appellants' costs in this Court and in the Lower Appellate Court.

T. S. V. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Sardar Khan Sahib *Petitioner* (Accused)*

v.

Athanlla *Respondent (Complainant).*

Sardar Khan Sahib v. Athanlla.

Criminal Procedure Code, Ss. 350 *and* 528—*Case partly tried by one Magistrate—Transfer of Magistrate—Grant of* de novo *trial by successor—Transfer of case to old Magistrate to avoid new trial—Legality of.*

A Magistrate who had almost completed the trial of a case was transferred to another station and his successor taking up the case granted a *de novo* trial to the accused. Thereupon the District Magistrate ordered the case to be transferred to the Magistrate who had tried it in part, as he thought it would obviate the necessity for a *de novo* trial. *Held,* the grant of a *de novo* trial by the successor of the Magistrate had the effect of wiping out the prior proceedings and hence even the old Magistrate could not proceed with the trial from the point where he left it. There was consequently no question of balance of convenience and a transfer was not necessary. *Jago Singh* v. *Emperor,* 53 I C 820 followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Salem, dated 21st July, 1924, in C. M. C. Nos. 31 and 32 of 1924, transferring C. C. Nos. 113-A and 113, on the file of the Court of the Sub-Magistrate of Dharmapuri, to the file of the Treasury Deputv Magistrate of Salem.

K. S. Jayarama Aiyar for accused-petitioner.

The Public Prosecutor (J. C. Adam) for Crown.

M. S. Rathnasabapathy Mudaliar for respondent-complainant.

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*Cr R C Nos. 508 and 509 of 1924 (Cr R P Nos. 420 and 421 of 1924). 21st August, 1924.

Sardar Khan Sahib v. Athanlla.

The Court made the following

ORDER :—These cases were tried before Mr. Pinto, while he was the Sub-divisional Magistrate of Dharmapuri; but before the trial was over, he was transferred to Salem as the Treasury Deputy Magistrate. Mr. Pinto's successor at Dharmapuri granted the accused a *de novo* trial. The District Magistrate has now ordered the transfer of these cases to the file of Mr. Pinto at Salem on the ground—

> "that the balance of convenience is strongly in favour of the small amount of work still to be done being done by Mr. Pinto at Salem, rather than the whole case should be heard again by a new Magistrate at Dharmapuri."

It has been assumed by the District Magistrate that Mr. Pinto could go on with the trial of the cases from the point where he had left it. In the decision reported in *Jago Singh* v. *Emperor* (1), it has been held by a Bench of the Patna High Court, in similar circumstances, that when on the transfer of a Magistrate, a criminal case pending before him is taken up by another Magistrate and the trial is started *de novo*, the proceedings, which had already taken place before the Magistrate, who has been transferred, are wiped out and such Magistrate has no jurisdiction on his return to the district to proceed with the trial from the point where he had left it. Applying the principle of this decision to the facts of the present case, I am inclined to think that, if Mr. Pinto took up the cases from the point where he left it and went on with the trial, his procedure would be illegal and the cases would have to be tried *de novo*. The balance of convenience relied upon by the District Magistrate as a justification for the transfer does not, therefore, really exist. The question as regards the hardship and the inconvenience which the transfer of the cases to Salem will cause to parties and their witnesses, all of whom are alleged to belong to Dharmapuri, has also not been considered by the District Magistrate.

I therefore set aside the order of the District Magistrate transferring the cases to the file of the Treasury Deputy Magistrate at Salem. The Sub-divisional Magistrate of Dharmapuri will take up the cases on his file and proceed with their trial.

In this view, it is unnecessary to consider the further question raised by the petitioner's learned vakil that the District

1. (1919) 53 I C 820.

Sardar Khan Sahib v Athanlla.

Magistrate had no jurisdiction to transfer the cases to the file of Mr. Pinto, under S. 528, Criminal Procedure Code, since Mr. Pinto is only a Treasury Deputy Magistrate.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Dada Sahib (minor) by next friend and maternal uncle Hirebal Baba Sahib ... *Appellant* * (*Plaintiff*)

v.

Kollapuram Gajaraj Singh and another ... *Respondents* (*Defendants.*)

Dada Sahib v. Gajaraj Singh.

Minor—Decree against—Guardian absent—Vakil reporting absence of instructions—How far binding—Gross negligence of guardian—Award—Property given to person not party to reference to arbitration—Family arrangement—Binding nature of.

The guardians of a minor defendant had taken out subpœnas for his witnesses, but on the day of hearing neither he nor the witnesses were present. His pleader asked for adjournment, but as the guardian was not present he could not place before the Court all the circumstances which alone would enable the Court to consider whether the request for adjournment was reasonable or not. The adjournment was refused and the suit was decreed against the minor. *Held,* the guardian was guilty of gross negligence and the decree was not binding on the minor.

Where the heirs of a deceased person referred their disputes to arbitration, and one of them wanted that any share allotted to him should be given to his minor son, and this was accordingly done, the arrangement arrived at cannot be vitiated by the fact that properties were given to a person not a party to the reference. Such an award can be upheld as a family arrangement.

Second Appeal against the decree of the Court of the Subordinate Judge of Bellary in A. S. No. 21 of 1921, preferred against the decree of the Court of the District Munsif of Bellary in O. S. No. 123 of 1920.

C. S. Venkatachariar and *N. C. Vijayaragavachariar* for appellant.

K. Rajah Aiyar for respondents.

The Court delivered the following

JUDGMENT :—In this Second Appeal, two points are urged by the appellant. The first is that his guardian (O. S. No. 258 of 1916) was guilty of gross negligence, and therefore,

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*S A No. 256 of 1922. 6th August, 1924.

the decree in that suit is not binding on him ; the second is that the arrangement under which the appellant was given a house was a family arrangement and the appellant is entitled to the benefit of such arrangement.

The plaintiff-appellant brought the suit for a declaration of his right to the plaint shop and to recover possession from the 1st defendant. The 1st defendant brought O. S. No. 258 of 1916, for the possession of the plaint property, against the plaintiff, as 2nd defendant, and his father as 1st defendant, alleging that the father had sold the property to him and that he was entitled to possession of the same. The 2nd defendant was represented by a Court guardian, as no proper guardian was available. The Court guardian, on the day the case was taken up, was absent and the suit was decreed *ex parte*. The present suit is for the purpose of recovering, from the plaintiff in O. S. No. 258 of 1916, the possession of the property, on the ground that the decree in that suit is not binding on the minor, by reason of the negligence of his guardian. The District Munsif found that the plaintiff's guardian in the previous suit was guilty of negligence and that the decree in that suit was not binding on the plaintiff ; but he found the second point against the plaintiff and dismissed the suit. On appeal, the Subordinate Judge held that the plaintiff's guardian in the previous suit was not guilty of negligence.

The admitted facts are that on the day the case came on for trial the plaintiff's guardian, who was a vakil of the Court, was absent and his vakil asked for time, which was refused. It is in evidence that the plaintiff's guardian had taken out subpoenas for the witnesses and had done everything to get the case ready for trial, but he himself was absent on that day. The Subordinate Judge holds that the fault was entirely on the part of the Court and there was no negligence on the part of the guardian. I am unable to agree with that conclusion. It was the duty of the guardian to have been present in Court for the purpose of informing the Court of the steps he had taken and of placing before the Court materials which could enable the Court to consider whether the request for adjournment was a reasonable one or not. The guardian's absence prevented his vakil from placing before the Court all the facts necessary in order to enable the Court to grant time, and this has led to the suit being decreed against the plaintiff. It is not every kind of negligence that would be a sufficient ground

Dada Sahib v. Gajaraj Singh.

for setting aside a decree, or for declaring that the proceedings in Court are null and void ; but where the guardian omits to do his plain duty and where by reason of such negligence a suit is decided against a minor, which would not have been otherwise decreed against him, it must be held that the guardian's negligence contributed to the Court proceedings in the manner it did. In this case, the fact that subpœnas had been taken out and that there were circumstances which prevented the witnesses from attending on the day of trial was only known to plaintiff's guardian and his absence on that day materially contributed to the course adopted by the Court. The Court is not supposed to be aware of facts which have happened in the office unless such facts are brought to its notice in open Court, and the opportunity for bringing such facts to the notice of the Court was lost on account of the absence of the plaintiff's guardian. In this connection, I may refer to an observation of the learned Judges in *Punnayya* v. *Viranna* (1) :—

> "It must be such negligence as leads to the loss of a right which might have been successfully asserted if the suit had been defended with due care."

I hold that the guardian was guilty of gross negligence and, therefore, the decree in O. S. No. 258 of 1916 is not binding upon the plaintiff.

As regards the second point, the appellant's contention is that the plaint property was given him under a family arrangement. The plaintiff's grandfather died, leaving considerable property. His father and the other members of the family gave a *muchilika* to some respectable persons for the purpose of dividing the property among them. That *muchilika* is marked Ex. A. By Ex. B, another *muchilika*, the plaintiff's father authorised the panchayatdars to allot to the plaintiff the immoveable property that may fall to his share. The relevant words of the *muchilika* are :—

> "Out of the moveable and immoveable properties that might be given towards my share, according to the said conditions, the immoveable properties alone may be given to my son, minor Dada Sahib. I shall have no right to or interest in them. I shall act as the guardian of the minor."

Ex. C is the award of the arbitrators ; and the arbitrators set apart the plaint property to the plaintiff. The contention of the respondent's vakil is that the plaintiff was not a party to the arbitration and, therefore, he is not entitled to get any benefit under the award. No doubt the plaintiff was not

1. (1921) I L R 45 M 425 at 428 : 42 M L J 429.

Dada Sahib v. Gajaraj Singh.

a party, but his father, who was a party to the submission, asked the arbitrators to deal with his share in a particular way; and the arbitrators after consulting all the members of the family gave this particular property to the plaintiff. They also made provision for one Karim Bi, who was not entitled to share in the estate of the plaintiff's grandfather. Under the Mahomedan Law, the plaintiff was not an heir to his grandfather's property. The contention of the appellant is that this being a family arrangement, persons who are not parties to the arrangement, but who get some benefit under the arrangement are entitled to have that benefit. It is clear from the award that the arbitrators after consulting all the members of the family distributed the family property among the various members and made provision for the maintenance of widows, who were not entitled to be given maintenance under the Mahomedan Law. That being so, the question arises whether, under an arrangement like this, a person who would not otherwise be benefited and who is given some benefit under it, should be held to be entitled to such benefit. It is well settled that in the case of partition deeds and family arrangements, widows, mothers and other relations who would not be entitled to a share, but who are given some benefit under the arrangement are entitled to have the benefit of such arrangement. It is urged by the appellant's vakil that the arbitrators might be considered as agents of the plaintiff's father and the plaintiff authorised such agents to transfer his property to the plaintiff. The award has been registered, and if this argument is good, then, the award would amount to a conveyance of the plaint house to the plaintiff. But it is unnecessary to rely on this argument for the support of the appellant's case, I consider the arrangement evidenced by the award to be a family arrangement, in which the interests of all the members of the family were considered by respectable persons; and in consideration of the circumstances of what was beneficial to the members of the family, a certain arrangement was made, under which the plaintiff was given the plaint house. Such an arrangement cannot be considered to be invalid, merely on the ground that the plaintiff was not a party to the submission.

The respondent's vakil contends that this is not a case of trust and, that in creating a trust, a registered instrument would be necessary. The appellant does not rest his case on the ground that a trust was created in favour of

Dada Sahib
v.
Gajaraj
Singh.

the plaintiff. The plaintiff's father agreed to act as his guardian for the purpose of receiving the property and being in possession of it on behalf of the minor. The case in *Hira Singh* v. *Ganga Sahai* (2) has no application to the present case. There, as their Lordships observe at page 328

"It did not appear that Hira Singh or any one having authority to act for him in that behalf had consented to be bound by the terms of the award. He was in possession before the arbitration, and continued in possession, and he made that possession and not the award the foundation of his claim to a partition. The award was produced by Debi Singh, who was indeed his witness, but who proved that it was signed by Amin Singh and Ganga Sahai, in answer to a question by the pleader for the defendants. Hira Singh was a stranger to the submission, and was under no obligation to abide by the award, and consequently he could not avail himself of it."

In that case, the contention was that a member of a Hindu family who was deaf and dumb and who was not a party to the award was entitled to the benefit under the award. In that case, if some property had been set apart for the maintenance of the person who was deaf and dumb, then such an arrangement would have been upheld ; but a person who was a stranger to the award and who did not consent to the submission could not claim the benefit under the award. Here the plaintiff was a minor and the arrangement by all the members of the family was for the benefit of the minor, on the ground that his father was leading an immoral and wasteful life. I find the second point in favour of the plaintiff.

In the result, the plaintiff will be entitled to a decree for possession of the suit property. I set aside the decrees of the Lower Courts and decree the plaintiff's suit with costs throughout.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—CHARLES GORDON SPENCER, *Officiating Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

P. Baba Sah *Appellant** (*Deft.*)

v.

V. M. Purushothama Sah *Respondent* (*Plff.*)

Baba Sah
v.
Purusho-
thama Sah.

Letters Patent (*Madras*), *Cl.* 15—*Order allowing plaintiff to sue as a pauper —If amounts to judgment—Appeal—Opportunity to defendant to disprove pauperism—Government not opposing—Effect.*

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*O S Appeal No. 50 of 1924. 26th August, 1924.

2. (1883) I L R 6 All 322 (P C.)

Baba Sah v Purushothama Sah.

An order of a single Judge sitting on the Original Side of the High Court granting permission to the plaintiff to sue *in forma pauperis* amounts to a judgment within the meaning of cl. 15 of the Letters Patent and is hence appealable. *Appasami Pillai* v. *Somasundara Mudaliar,* I L R 26 M 437 not followed.

At the hearing of an application for leave to sue as a pauper, even if the Government admits the pauperism of the plaintiff, the defendant should be given opportunities to prove that plaintiff was not a pauper.

On appeal from the order of the Hon'ble Mr. Justice Kumaraswami Sastri, dated 15th April, 1924 and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 275 of 1924.

K. Krishnaswami Aiyangar for appellant.

K. Rajah Aiyar for respondent.

The Judgment of the Court was delivered by

Spencer, Offg C. J.

THE OFFICIATING CHIEF JUSTICE :—This is an appeal against an order of Mr. Justice Kumaraswami Sastri permitting the plaintiff in C. S. No.275 of 1924 to sue *in forma pauperis*. A preliminary objection has been taken that no appeal lies. In *Appasami Pillai* v. *Somasundara Mudaliar* (1) it was held that there was no appeal under the Letters Patent against an order of a single Judge, refusing to give leave to appeal *in forma pauperis*. Although the Civil Procedure Code does not provide for appeal against orders made under O. 33, R. 7, an appeal lies under cl. 15 of the Letters Patent against a judgment of a single Judge sitting on the original side with certain exceptions, which do not include the present kind of order. It is argued that the order of the learned Judge was merely an order upon an interlocutory application, which was a step towards obtaining a final adjudication and that it does not finally dispose of the plaintiff's right to bring the suit, as it was always open to him to pay the Court-fees and proceed. In our opinion, the learned Judge's order was not an interlocutory one and we think that the law confers a substantive right on every plaintiff, who has a good case at law, but no means to prosecute it, to sue *in forma pauperis* and we think, with due respect that the view taken in *Appasami Pillai* v. *Somasundara Mudaliar* (1) where such an order was treated as made in the exercise of a discretionary power, was not the correct view to take of the order passed upon such applications under S. 592 of the old Civil Procedure Code ; the words used are

1. (1902) I L R 26 M 437.

Baba Sah v. Purushothama Sah.

Spencer, Offg. C. J.

"Any person entitled to prefer an appeal, who is unable to pay the fee required..........may..........be allowed to appeal as a pauper."

The learned Judges treated these words "may be allowed" as vesting in the Court a discretionary power. But the principle on which that case was decided has been doubted in the Full Bench decision in *Tuljaram Row* v. *Alagappa Chettiar* (2) and it has now been made quite clear by O. 44, R. 1, of the present Code that such applications have to be dealt with, in the same manner as applications to sue *in forma pauperis* in the first instance. In O. 33, R. 7, cl. 3 the words are :

"The Court *shall* then either allow or refuse to allow the applicant to sue as a pauper."

It can no longer be doubted that it is not open to the discretion of the Court to allow a person to sue as a pauper, if on hearing the evidence the Court finds that he is not a pauper. The final order of a Judge sitting on the Original Side allowing or refusing to allow a plaintiff to sue as a pauper is, in our opinion, a judgment under cl. 15 of the Letters Patent.

As to the merits of the present appeal, the defendant filed a counter-affidavit denying the plaintiff's allegation that he had no means and giving details as to a number of items of property, which belong to him and as to a fraudulent alienation of property in favour of his nephew shortly before he applied to sue as a pauper. The plaintiff did not file any reply affidavit. After several adjournments, the matter then came before the Court and the learned Judge gave leave to the plaintiff to sue as a pauper, upon the Government Solicitor stating that he had received a report that the petitioner was a pauper. The applicant now says in his affidavit, that he was prepared to cross-examine the plaintiff and to let in evidence in support of his allegations. We think that if the Judge was not prepared to act on his uncontradicted affidavit, the defendant should have been given an opportunity to prove the statements contained in it, notwithstanding that the Government did not choose to dispute the alleged pauperism. Apparently he had no evidence ready at that hearing and he wanted time to produce his witnesses. But it appears that he expected that the other side would ask for an adjournment to file a reply affidavit and that they would not allow his statements to remain uncontradicted. It was reasonable therefore to suppose that if he had applied for time to produce his evidence, he would have got an adjourn-

2. (1910) I L R 35 M 1 at 17 : 21 M L J 1 (F B).

ment, and we think that now he should be given an opportunity of substantiating his allegations. The learned Judge's order is therefore set aside and the case will be remanded for letting in such evidence, as the parties may adduce to prove or disprove the plaintiff's pauperism and for making a fresh order after considering such evidence. Costs of this appeal to abide and be provided for in the final order.

Baba Sah v. Purushothama Sah.

Spencer, Offg. C. J.

T. S. V. *Appeal allowed.*

PRIVY COUNCIL

(On Appeal from the Chief Court of Punjab.)

PRESENT :—LORD DUNEDIN, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

Mt. Lajwanti and others *Appellants**

v.

Safa Chand and others *Respondents.*

P. C

Lajwanti v. Safa Chand.

Adverse possession—Hindu widow—Nature of estate acquired—Rights of husband's heirs.

A Hindu widow succeeding as heir to her husband is not a life renter but has a widow's estate, that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to any one as to certain properties, she does not acquire the properties as her *stridhanam* but she makes them good to her husband's estate. On her death the properties so acquired descend to her husband's heirs.

Appeal from a decree and judgment of the Chief Court of Punjab reversing the decree and judgment of the District Court.

De Gruyther, K. C. and *W Wallach* for appellants.

Sir George Lowndes, K. C. and *K. C. Sen* for respondents.

29th January, 1924. The Judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN :—Jawahara Mal, a Datt Brahmin, living in the Punjab, died in 1852. He was survived by three wives, but at the time of his death had no children. Shortly after his death, as alleged, his eldest wife had a posthumous son named Hira Nand, who died after a few months. He undoubtedly had a posthumous daughter by his second wife, who is plaintiff in this action. He had three brothers, the eldest Bhim Sen, who in turn had two sons Hemraj and Jamiat Raj. The other two brothers were Ram Bhuj and Gowhur Sen, who both had sons and grandsons who are some of the respondents in this case. He and his brothers were possessed of considera-

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*P C Appeal No. 60 of 1922. 29th January, 1924.

P. C.
Lajwanti v. Safa Chand.
Lord Dunedin.

the property, ancestral and otherwise. After his death his widows were entered in the settlement records as proprietors of a fourth share of certain Mauzas. In 1865 a new settlement was being made, and in furtherance of the entries to be made therein an action was raised by Hem Raj in 1867 asking that the entries of all parties except himself should be deleted in respect of certain Mauzas. Hem Raj raised the action in two capacities. He was sole heir of his father, Bhim Sen, his brother Jamiat Raj having renounced all his rights in his favour and he was also, he alleged, the adopted son of Jawahara Mal and as such his heir. He cited all the members of the joint family and the two widows of Jawahara Mal, the eldest widow having died in 1862. The first question that had to be determined was whether the Mauzas, as to which he made exclusive claim, were the separate property of Bhim Sen and Jawahara Mal, or whether they were family property. As to certain of the Mauzas it was determined that they were the separate property acquired by Bhim Sen and Jawahara Mal. That being so he was entitled to one-half as sole heir of his father. His claim to the exclusive possession of the other half depended upon whether he could make out adoption and this was found against him. Appeals were taken as to different Mauzas by all the parties concerned. The case went to the Chief Court and the Chief Court finally decided as follows:

His claim to the one-half was confirmed. As regards his claim to the other half it was said that he had abandoned his claim in virtue of adoption, and it was pointed out that his uncles, on Jawahara Mal's death, would always be preferable to him. That disposed of his claim, but the judgment then went on to deal with the questions that had arisen on the various appeals between the different defendants. The judgment continued thus :—

The only other question for decision with regard to these Mauzas is whether the widows are entitled to hold the half-share left by Jawahara Mal for their lives. They clearly are so entitled as, according to the facts as found above, the fathers of the appellants who took the inheritance were separate in food and estate from Jawahara Mal. at the time of his death."

This final judgment was given in 1869 and the widows were duly entered as proprietors of certain Mauzas in respect of their widows' estate of the estate of their late husband Jawahara Mal. They entered into possession. The elder of the two—that is to say, the original second widow—lived till 1900, when she died.

P. C.

Lajwanti v. Safa Chand.

Lord Dunedin.

The Mauzás were then possessed by the third and surviving widow till her death in 1910. On her death the daughter of the second wife raised the present suit to have declared her right to the Mauzas as heir of her father Jawahara Mal. Her claim is opposed by various descendants of Jawahara Mal's brothers, who claim as heirs of Hira Nand, to whom the property went on his birth after his father's death, they alleging that the long possession of the widows was only by reason of an arrangement that they should hold the Mauzas as maintenance. Certain persons who might have been respondents backed up the plaintiff and were added as plaintiffs; a very unnecessary proceeding, as no decree could pass in their favour. As already stated, the plaintiff denied that Hira Nand ever existed. The District Judge held that Hira Nand never had existed. He then decreed half the property to the plaintiff and half to certain of the respondents on grounds which no one supports and which need not here be specified. Both parties appealed. The learned Judges of the Chief Court reversed that judgment and found that Hira Nand did exist, and that in consequence the respondents are entitled as heirs to his estate. They mention a question as arising on adverse possession of the widows, but they did not really deal with the argument that arises thereon. Appeal has been taken from that decree.

Their Lordships will assume that the judgment is right in saying that Hira Nand did exist, but if he existed, then, in the litigation which arose in 1867 and was finished in 1869, his heirs who either are, or are represented by the various respondents in this case, were entitled totally to exclude the widows from the Mauzas in question. All that the widows were entitled to was maintenance. The allegation that they were allowed to possess the Mauzas in name of maintenance was not admitted to be proved and further it is straight in the teeth of the judgment of the High Court of 1869 already quoted. It is clear, therefore, that though the judgment may have been wrong, there has been adverse possession by the widows from 1869 to 1910 and the respondents' title is destroyed by S. 28 of the Limitation Act. It was then argued that the widows could only possess for themselves that the last widow Devi would then acquire a personal title ; and that the respondents and not the plaintiff were the heirs of Devi.

P. C.

Lajwanti v. Safa Chand.

Lord Dunedin.

This is quite to misunderstand the nature of the widows' possession. The Hindu widow, as often pointed out, is not a life renter but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as *stridhan* but she makes them good to her husband's estate. The result is the Mauzas are Jawahara Mal's estate, the respondents having no title to attack them, and as such the plaintiff is entitled as heir to her father to take them.

An attempt was made to say that the result as above, being founded on the Mitakshara Law, a different result should be arrived at because of a custom in the Punjab. Their Lordships are not able to consider any such plea because the record was void of averment and of proof of the precise custom which would lead to a different result from that obtained under the Mitakshara Law. The result is that the appeal must be allowed and judgment pronounced in favour of the plaintiff, with costs here and in the Courts below, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants *H. Polak.*

Solicitors for respondents : *Ranken, Ford and Co.*

Appeal allowed.

PRIVY COUNCIL

(On Appeal from the Chief Court of Punjab)

PRESENT :—LORD DUNEDIN, LORD SHAW, LORD CARSON, SIR JOHN EDGE AND MR. AMEER ALI.

Hari Baksh *Appellant**

v.

Babu Lal and another *Respondents.*

Hari Baksh v. Babu Lal.

Hindu Law—Partition—Property allotted to a sharer—Ancestral Property—Partition among co-parceners—If effects a severance between a co-parcener and his own descendants.

Where at a partition among the members of a joint Hindu family governed by the Mitakshara Law certain property is allotted to the share of a member, he takes it as ancestral property in which his sons get a right by birth.

A partition among several brothers constituting a joint Hindu family governed by the Mitakshara Law does not necessarily cause a severance between a brother and his own descendants also. *Balabux* v. *Rukhmabai,* 30 C 725 ; *Balkishen Das* v. *Ram Narain Sahu,* 30 C 738 ; and *Jatti* v. *Banwari Lal,* 45 M L J 356 distinguished.

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*P C Appeal No. 106 of 1922. 22nd January, 1924.

P. C.

Hari Baksh v. Babu Lal.

Appeal from a decree of the Chief Court of the Punjab (Shah Din and Broadway, JJ.), dated 2nd June, 1917, reversing a decree of the District Judge of Delhi, dated 15th May, 1914, in plaintiff's favour.

Sir George Lowndes, K.C. and *E. B. Raikes* for appellant.

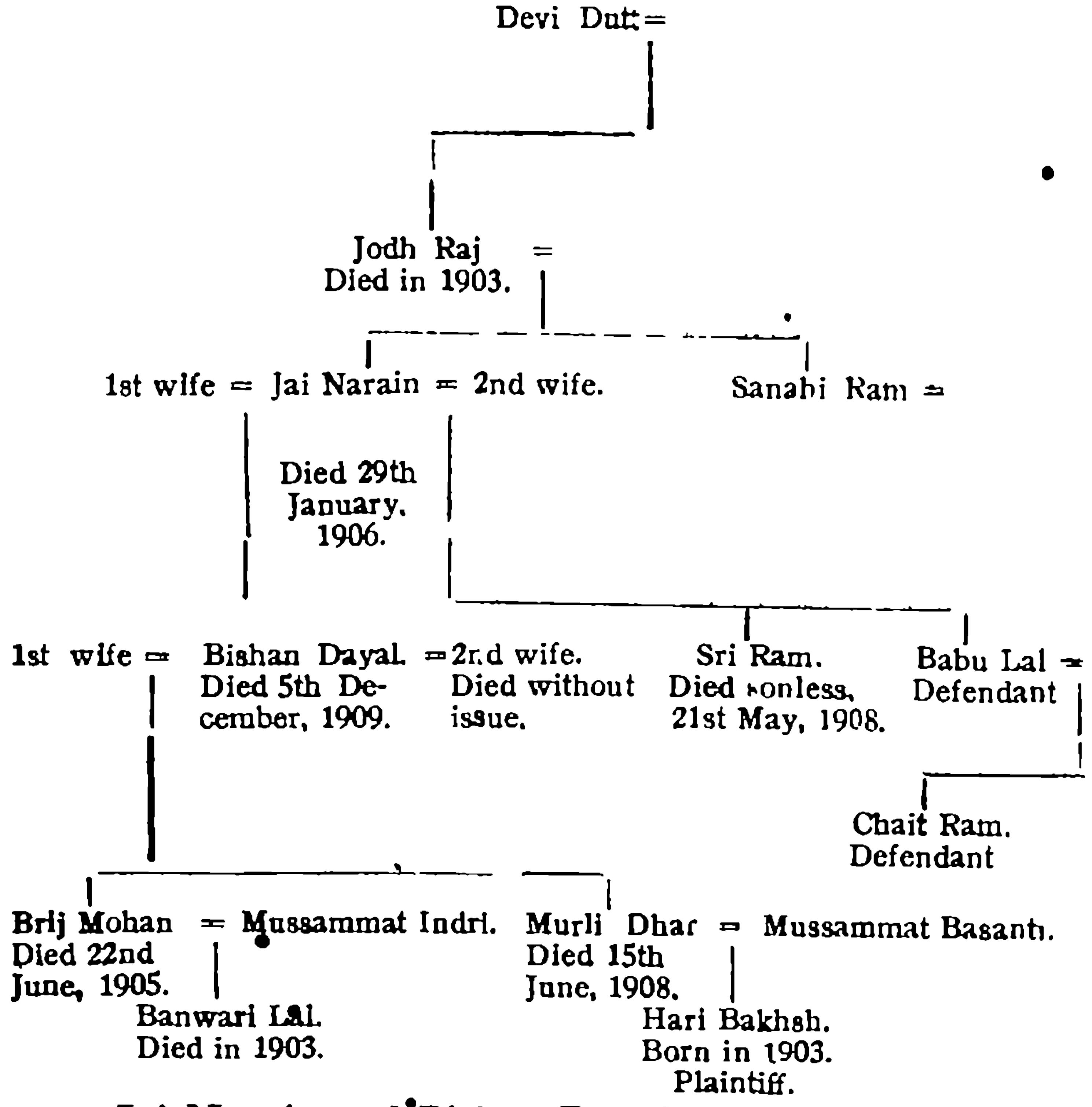
Dunne, K. C. and *W Wallach* for respondents.

22nd January, 1924. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE :—This is an appeal by the plaintiff from a decree, dated the 2nd July, 1917, of the Chief Court of the Punjab, which reversed a decree, dated the 15th May, 1914, of the District Judge of Delhi, and dismissed the suit. The suit is for the partition of property alleged by the plaintiff to be joint property of the parties.

The parties are Hindus of the Bakkal Aggarwall caste, and are subject to the law of the Mitakshara. The following pedigree shows how the parties are related to each other :—



Jai Narain and Bishan Dayal had daughters, to whom it is not necessary to refer.

P. C.
Hari Baksh v. Babu Lal.
Sir John Edge.

The plaint in this suit, dated the 21st November, 1910, was presented to the Court of the District Judge of Delhi by Hari Baksh, a minor, by his guardian and next friend, Mt. Basanti, who is his mother. The defendants to the suit are Babu Lal and his son, Chait Ram..

The case of the plaintiff was that he and the defendants are the surviving male members of a joint Hindu family possessed of joint property, to a half-share of which he claimed to be entitled on partition, and he claimed to be entitled to a decree for partition and for accounts, and other reliefs. The District Judge of Delhi gave the plaintiff the decree which he claimed. The Chief Court of the Punjab, on the 2nd July, 1917, in appeal, dismissed the suit. On an application for review the Chief Court varied its decree dismissing the suit by granting the plaintiff a decree for partition of the Maliwara house and a declaration that the Katra Ashrafi house at Delhi is the property of the family, and that the plaintiff has equal rights in it with the defendant, Babu Lal. To the application for review the two defendants were respondents, and it does not appear why the declaration was not made against Chait Ram as well as against Babu Lal.

The case of the defendants was a denial that they and the plaintiff were members of a joint family, and a denial that the property which the plaintiff claimed to have partitioned was joint family property. Several defences were set up. The defendants alleged that Bishan Dayal and his sons formed a separate joint family, and that they after 1903 had separated from each other and had partitioned the property to which they were entitled they further alleged that Sri Ram had adopted Chait Ram as his son. Their Lordships will at once deal with these allegations before proceeding to consider what was the main and substantial defence, if proved, to the suit, which was that in a separation and partition of 1903, in which Jai Narain and his branch had separated from Sanahi Ram and his branch, Jai Narain and his sons had between themselves separated, and he had partitioned between his son Bishan Dayal on the one side and his sons Sri Ram and Babu Lal on the other side the property which had fallen to him, Jai Narain, and his branch in the partition with Sanahi Lal.

The District Judge found that there was absolutely no proof of the alleged partition between Bishan Dayal and his

sons after 1903. It was the fourth issue framed by the District Judge. It is not clear that that issue was discussed or considered in the appeal to the Chief Court, but in this appeal nothing was said to suggest that the finding of the District Judge on the fourth issue was wrong and their Lordships consider that the finding of the District Judge may be accepted as conclusive, that there was no separation or partition between Bishan Dayal and his sons after 1903 or at any time.

The object of alleging that Chait Ram had been adopted by Sri Ram is obvious. If that adoption had been proved the plaintiffs could not in any event have been entitled on a partition to one-half of the property in question in this suit, or to more than one-third of it and the defendants would between them have been entitled to two-thirds of it. The District Judge and the Chief Court concurred in finding that the alleged adoption was not proved. Such an adoption by a brother of the only son of his brother would be most unusual, and their Lordships accept that concurrent finding as correct.

The first common ancestor of the parties shown in the pedigree is Devi Dutt. He, with his son, Jodh Raj, carried on business as merchants at Basan, in the State of Jaipur. Jodh Raj removed from Basan to Delhi, and at Delhi he and his sons carried on business as cloth merchants. They had also branch shops at Calcutta and at Cawnpore. In 1903 the shops which belonged to the joint family, then consisting of Jodh Raj, his sons and grandsons, were known as (1) Jodh Raj Narain, at Delhi ; (2) Jai Narain Khemka, at Delhi ; (3) Sri Ram Ram Lal, in which a stranger was a partner, at Delhi ; (4) Murli Dhar-Deoki Nandan, in which strangers were partners, at Delhi ; (5) Jodh Raj-Sanahi Ram, at Calcutta ; and (6) Jai Narain-Sanahi Ram, at Cawnpore.

It is an admitted fact that at the time when Jodh Raj died, in 1903, Jodh Raj, his sons Jai Narain and Sanahi Ram, and their respective descendants constituted a joint Hindu family possessed of the joint property already mentioned. It is also an admitted fact that in 1903, after Jodh Raj had died, Sanahi Ram and his son separated from Jai Narain and his descendants, and that on that separation the then joint property of the family at Delhi, Calcutta, and Cawnpore was partitioned between the two branches into which the joint family had separated, and that in that partition, which will hereafter be referred

P. C.

Hari Baksh v. Babu Lal.

Sir John Edge.

to as the partition of 1903, the shops (1), (2), and (3) above mentioned fell to Sanahi Ram and his branch, and the shops (4), (5) and (6) fell to Jai Narain and his branch.

The case of the defendants is that in the partition of 1903 Jai Narain and his sons also separated from each other and ceased to constitute a joint family. The District Judge held that the onus of proving that Jai Narain and his sons had separated from each other was upon the defendants, who alleged it. It has been argued, on behalf of the defendants, before their Lordships in this appeal that the onus of proving that Jai Narain and his sons had separated was not upon the defendants, and that it was for the plaintiff to prove that they had not separated. Their Lordships will presently express their opinion on that question, but they will first consider whether the evidence which was before the District Judge and the Chief Court proves or does not prove that Jai Narain and his sons separated, and for that purpose it is necessary to state some facts which have not so far been referred to by them.

Bishan Dayal lived in Cawnpore and had been in charge of and had managed the shop there. Bishan Dayal married twice, and after his second marriage he and his daughter-in-law, Musammat Basanti, had quarrelled, and he offered, through her brother, Rs. 30,000 as an inducement to her to hand over to him the custody of his grandson, Hari Bakhsh, the plaintiff. That offer was refused, and Bishan Dayal determined to oppose a claim which Musammat Basanti was making on behalf of her son, Hari Bakhsh, for the partition of the property now in question in this suit. On the 7th August, 1909, a suit was instituted in the Court of the Subordinate Judge of Cawnpore on behalf of Hari Bakhsh by his mother, Musammat Basanti, against Babu Lal, his son Chait Ram, and Bishan Dayal for the partition of the property now in question in this suit. Subsequently Musammat Basanti was added as a plaintiff in that suit, and Musammat Sarasuti, the widow of Sri Ram, and Musammat Indri, the widow of Brij Mohan, were added as defendants. The Additional Subordinate Judge of Cawnpore, before whom that suit was, on the 15th April, 1910, framed the issues for trial and ordered that the parties should file all their documents on that day. The Additional Subordinate Judge probably considered the evidence which the parties had brought before him, and having come to a

conclusion that the Court of the Subordinate Judge had not jurisdiction to hear and determine that suit for partition, he, on the 29th August, 1910, returned the plaint to be presented in the proper Court. It is not now necessary for their Lordships to consider whether the Additional Subordinate Judge had or had not jurisdiction to hear and determine that suit. They refer to it with an object which will presently appear.

As has been already mentioned, Bishan Dayal was a defendant to the suit for partition which was brought in the Court of Cawnpore on the 7th August, 1909. He made his will on the 26th November, 1909, and in it stated that in Sambat 1960, his step-brothers, Sri Ram and Babu Lal, had separated from him. In that suit of 1909 Bishan Dayal filed a written statement on the 30th November, 1909, in which he alleged that Jai Narain in the partition of 1903 had divided the property which had fallen to his share between him and Bishan Dayal on the one side, and Sri Ram and Babu Lal on the other side. Bishan Dayal died on the 5th December, 1909. On the part of the defendants, it has been contended in this appeal that the statements of Bishan Dayal in his will and written statement, above mentioned, are admissible in evidence in this suit as against the plaintiff, and prove that Sri Ram and Babu Lal had separated in 1903 from Bishan Dayal, that the family then ceased to be a joint family, and that the share of the joint family which fell to Jai Narain and his descendants in the partition of 1903 was partitioned between Bishan Dayal on the one side and Sri Ram and Babu Lal on the other. It appears to their Lordships that these statements of Babu Lal, who was then an interested party in the disputes and was then taking a position adverse to Hari Bakhsh, cannot be regarded as evidence in this suit and are inadmissible.

Excluding from consideration the statements of Bishan Dayal in his will and written statement, the only admissible evidence not open to objection and not ambiguous and inconclusive is, if genuine, a letter which purports to have been written by Bishan Dayal to his brother Babu Lal, dated "Phagan Sudi 2, Sambat 1965" (22nd February, 1909), which was for the first time produced by the defendant Babu Lal on the 14th October, 1911. That letter (Ex. D-14) as translated is as follows :—

P. C.

Hari Baksh v. Babu Lal.

Sir John Edge.

"Compliments from Bishan Dayal to Sri Ram-Babu Lal

"Jai Narain in your presence separated us, the three brothers, on Asarh Badi 10, Sambat 1960. The whole work of Delhi remained with you, the two brothers, and the work at Cawnpore fell to my lot. This partition was effected by Jai Narain. We, the three brothers, agreed to his settlement and do not object to it. But the account of Sambat 1966 is not yet settled. Whatever is due under that account will be paid by you, the two brothers. I have nothing to do with it. The property situate at Basan and the houses in Delhi will remain joint. We of our own accord have written this. No one can object to it.

"Dated Phagan Sudi 2, Sambat 1965,

"What is written above is correct.

(Sd.) BISHAN DAYAL"
(*In Hindi characters.*)

"*Witnessed by*—

(Sd.) CHHOTE LAL KHEMKA,
GANGA RAM BHOT,
SUNDER MAL KHEMKA,
HARI RAM KANODIA,
SHEO NARAIN.

(*All in Hindi characters.*)"

Their Lordships are informed by counsel engaged in this appeal that Asarh Badi 10, Sambat 1960, was the 20th June, 1903.

The only witness at the trial who said that the letter was in the writing of Bishan Dayal was the defendant, Babu Lal. The only witnesses of the five to the letter who spoke to it at the trial were Chota Lal, Hari Ram and Sheo Narain, and not one of them said that it was written or executed in his presence. Sheo Narain in his evidence at the trial said that Bishan Dayal told him that it was a *farkhati*—that is, a release. At the trial before the District Judge Babu Lal said as to it (Ex. D. 14) :—

"The release to which (I) certified yesterday was with me. I have given (I gave it) it to my Pleader, Anand Sarup, for production (at the trial at Cawnpore). They said they would produce it when necessary. I cannot say if they produced it or not. After the close of the case I got back the release from my pleader."

Anand Sarup was the defendants' pleader at the hearing of the suit before the Additional Subordinate Judge at Cawnpore. Ex. D-14 was, if a genuine letter, one which should have been filed on behalf of the defendants in the Court of the Subordinate Judge of Cawnpore on the 15th April, 1910,

P. C.

Hari Baksh
v.
Babu Lal.

Sir John Edge.

in obedience to his order of that date. It was, if genuine, a most important document—in fact, the most important document for their case. It never was filed or produced at the trial before the Additional Subordinate Judge. If it was in the possession of Anand Sarup at any time, he should have been called as a witness at the trial before the District Judge of Delhi to speak to the fact and to explain why it was not filed or produced in the Court of the Additional Subordinate Judge. He was not called as a witness before the District Judge of Delhi and no explanation of his absence was offered. The District Judge found, as a fact, that Ex. D-14 was a forgery. The Chief Court, on the contrary, held that Ex. D-14 was a genuine document executed by Bishan Dayal. Their Lordships, after a careful consideration, find that Ex. D-14 is not a genuine document, and was manufactured for the purpose of being used in evidence at the trial before the District Judge of Delhi.

Excluding Ex. D-14 and the statements in the will and written statements of Bishan Dayal, which have been already mentioned, from evidence which can be considered in this suit, there is no documentary evidence which proves either that Bishan Dayal and his brothers, Sri Ram and Babu Lal, had or had not separated. The learned and able counsel engaged in this appeal have been compelled to admit that fact, and that all the other evidence in the suit is as consistent with the brothers never having separated as with the brothers having separated. The District Judge found that the brothers had not separated; the Chief Court, which treated Ex. D-14 as evidence, found that they had separated. Their Lordships agree with the District Judge that it is not proved that the brothers ever did separate.

It remains to be considered whether on the separation and partition between Jai Narain and his brother, Sanahi Ram, in 1903, it is to be presumed, unless the contrary is proved by the plaintiff, that Jai Narain and his sons, Bishan Dayal, Sri Ram and Babu Lal, and Jai Narain's grandsons, Brij Mohan and Murli Dhar, all of whom had then been born and were then living, ceased to be amongst themselves members of a Hindu joint family consisting of Jai Narain and his descendants then living. It must be remembered that they were Hindus governed by the law of the Mitakshara, and that each of them had on his birth become a co-parcener in any ancestral

P. C.

Hari Baksh v. Babu Lal.

Sir John Edge.

property which had come to Jai Narain. The share which Jai Narain took as the share of him and his branch on his separation from his brother, Sanahi Ram, was ancestral property.

It has been contended in this case on behalf of the defendants that the effect of the separation and partition between Jai Narain and his brother Sanahi Ram, in 1903, after the death of their father, Jodh Raj, was to cause, by implication of law, a separation between Jai Narain and his descendants and to make them cease to constitute amongst themselves a joint family unless it was proved that they had agreed to continue to be a joint Hindu family; and it was contended on behalf of the defendants that that proposition is to be inferred from the decisions of the Board in *Balabux Ladhuram* v. *Rukhmabai* (1), *Balkishen Das* v. *Ram Narain Sahu* (2) and *Jatti* v. *Banwari Lal* (3). It appears to their Lordships that the proposition contended for is a proposition which cannot reasonably be inferred from the decisions of the Board or any of them which have been cited. To understand and apply a decision of the Board or of any Court it is necessary to see what were the facts of the case in which the decision was given, and what was the point which had to be decided. In *Balabux Ladhuram* v. *Rukhmabai* (1) it appears that three Hindu brothers, Girdhari Lal, Kunyaram and Ladhuram, owned a shop which had been founded by their father, and that in 1869 or 1870 Kunyaram separated from his brothers, took out his share, amounting to about Rs. 11,000, and started a shop of his own. In that case Lord Davey, in delivering the judgment of the Board, said :—

"It appears to their Lordships that there is no presumption, when one co-parcener separates from the others, that the latter remain united... ....Their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to re-unite must be proved like any other fact."

The remaining members of the joint family in that case were the brothers, Girdhari Lal and Ladhuram. The Board was not considering, and had not to consider, whether, if Girdhari Lal, for example, had sons living when Kunyaram separated from his brothers, Girdhari Lal and his sons would cease to be as between themselves a joint family. That was not the case and did not arise in the case before the Board.

1. (1902) I L R 30 C 725 (P C). 2. (1903) I L R 30 C 738.
3. (1923) I L R 4 Lah 350.

P. C.

Hari Baksh v. Babu Lal.

Sir John Edge.

In *Balkishen Das* v. *Ram Narain Sahu* (2) the four members of a Hindu joint family, who were cousins, entered into an *ikrarnama* which stated that defined shares in the whole estate of the joint family had been allotted to the several co-parceners. It was there held that the agreement defining the shares effected a separation in estate, and that evidence of some of the co-parceners having continued to enjoy their shares in common would not affect their tenure of their property or their interest in it.

In *Jatti* v. *Banwari Lal* (3) four Hindu brothers who were living as a joint Hindu family executed a deed by which the assets of the family were described and divided between them, and one of the four brothers, Ishar Das, was finally paid out, and thereafter the business was carried on by the three remaining brothers, to whose separate accounts the profits of the business were carried in equal shares. In that case Lord Dunedin in delivering the judgment of the Board after quoting the passage above set out from Lord Davey's judgment, approved of and adopted the statement of the trial Judge in the suit, who said :—

> "There is absolutely no material on the file from which it can be inferred that the three brothers continued united or reunited as co-parcenary members of a joint Hindu family, while defendant's own books show the contrary......I have therefore not the least hesitation in finding that on the separation of Ishar Das the family of the parties ceased to be a joint Hindu family in the strictest sense of the term ; or, in other words, its members ceased to be co-parceners."

The members ceased to be co-parceners of each other, but it is not suggested that if one of those members happened to have had sons who were his co-parceners when Ishar Das separated from his brothers, such sons and their father would cease to be co-parceners constituting together a joint and undivided family.

If their Lordships were to hold in this case that it is to be presumed in law that the separation and partition effected in 1903 by Jai Narain and his brother, Sanahi Ram, involved necessarily a separation between Jai Narain and his sons, their Lordships would, it appears to them, be introducing a novel principle into the law of joint Hindu families governed by the law of the Mitakshara, for which no authority has been brought to the attention of their Lordships.

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2. (1903) I L R 30 C 738. (1923) I L R 4 Lah 350.

P. C.

Hari Baksh v. Babu Lal.

Sir John Edge.

In conclusion, their Lordships find that Jai Narain and his sons did not separate, that no separation between Bishan Dayal and his brothers, Sri Ram and Babu Lal, or between any of them, has been proved, and they will humbly advise His Majesty that the decree of the Chief Court of the Punjab should be set aside, and the decree of the District Judge of Delhi of the 15th May, 1914, should be restored and affirmed. The defendants (respondents) must pay the costs of this appeal and of the appeal to the Chief Court.

Solicitors for appellant *T L. Wilson and Co.*

Solicitors for respondents : *Ranken, Ford and Chester.*

Appeal allowed.

END OF VOLUME XLVII.

UNIVERSITY L... LAW COLLEGE

GENERAL INDEX.

VOL. XLVII.

Accretion and Alluvion—Assessment of land revenue, mode of—Act IX of 1847—Diara Survey—Map—Re-survey by Super-imposition—Functions of Board of Revenue 48

Act of State—Cession of territory—Treaty between Scindia of Gwalior and the British Government of 12th December, 1860—Pàttas granted in February, 1860, by Government of Scindia—Subsequent renewals thereof and proclamations by British Government—Recourse to Municipal Courts as to enforce rights arising under the Treaty of Cession—Plea of Act of State—When to be specifically raised—Onus of proof—Acts of acknowledgment of prior title by new Government—General statement in treaty that existing rights would be upheld—Meaning of ... 574

Act IX of 1847—Board of Revenue—Functions of—Orders final—When a court of law will interfere (P.C.) 48

Act X of 1922—Amendment of Limitation Act, S. 5—Whether meaning of old section affected—"By or under any enactment"—Whether includes "By any rule" (F.B.) 409

Admission—Question of law—Of pleader—If binds the party 415 *at* 417

Advancement—Presumption of—None in India—Bulk of properties purchased in the name of a wife—Only Benami 622

Adverse possession—Licensee—Possession of—In what circumstances constitutes—Knowledge of and acquiescence of licensor essential—Possession of *Kumri* lands by *wargdar* as against Government—When adverse (P.C.) 35

————Presettlement cattle-paths in a Zemindari—If a landholder can acquire ownership in—Impossibility 784

————Vatan lands—Permanent tenancy in—Acquisition by adverse possession of title to—Persons claiming by adverse possession already a tenant of the lands under vatandar—Effect—Stranger to vatan lands—Acquisition of title by adverse possession to same—Possibility in law of—Suit in which stranger claims such title—Parties—Secretary of State for India in Council if a necessary party—Alienation by vatandar of service vatan lands—Law as to—Bombay Act III of 1874, S. 5—Object of—Regulation XVI of 1827, S. 20—Alienation—Grant of right of permanent tenancy in vatan lands, if any 248

Agra Tenancy Act, S. 79—"Agricultural" land—Grove is not—six months limitation inapplicable, (P.C.) 824

Appeal—Against final order—Principles of preliminary order may be attacked 710

————Finding adverse—Appeal from—Decree in favour of party—Effect—Finding not *res judicata* 743

Apportionment—Indian Law as to—English Apportionment Act of 1870 and earlier Acts—Older English Law as to apportionment—Applicability in India—Rents and periodical payments, such as rents and profits from land—Dividends and income arising from shares carrying income periodically payable—Debts and securities bearing interest—Applicability to, of principle of apportionment—Presumption—Circumstances rebutting 79

Arbitration—Award—In favour of a son of one of the parties to the reference by consent—Validity—Parties heirs of a deceased person—Family arrangement ... 928

Assignment—Lien or charge—Assignment for purposes of collection—Rights of assignor, Civil Procedure Code, O. 5, R. 1 and O. 9, Rr. 9 and 13—Appearance by pleader—Pleader reporting no instructions—Dismissal for default—Restoration 514

Benami—Test of—Purchase by husband in the name of his wife—No presumption of advancement—Persons dealing with *benamidar*—Notice of real title—Mortgage by *benamidars*—Money applied for averting sale of property in execution of decree against the real owner—Rights of mortgagee 622

————Test—Source of purchase money—Bulk of one's properties purchased in the name of a wife—No presumption of advancement ... 622

Benamidar—No transfer effected—Conveyance by owner to a person benami for himself—Right to sue 415

Bengal Tenancy Act, 1885, S. 180—Chur land—Occupancy rights in—Acquisition by raiyat—Conditions (P.C.) 23

Bill of Lading—Exemption clause Perils of the sea—Burden of proof—Negligence—What amounts to—Damage by sea water—Liability for ... 150

Board of Revenue—Standing orders—If have the force of law ... 503

Bombay Act (III of 1874), S. 5—Object of—Interests of the state—Alienation—Creation of permanent tenancy—If one within the meaning of S. 5 (S. 20, Bom. Reguln. XVI of 1827)—Adverse possession by stranger as owner—Whether confers title on him—Quaere (P.C.) 248

Bombay Regulation (XVI of 1827), Ss. 19 and 20—Effect of (P.C.) 248

Burden of proof—Claim in execution proceedings dismissed—Suit by claimant—Benami sale in favour—Onus on claimant to show sale not benami 14

Cause of action—Bonus to employee—Promise to pay—Suit to enforce—Maintainability—Transfer of ownership in bonus to employee by employer—Suit to recover bonus in case of—Maintainability 791

——Domestic judgment—If and when affords—Declaratory unexecutable judgment—Suit on—Maintainability ... 829

Champerty—Agreement to finance litigation—Property existent but title to which is subject-matter of pending suit—Agreement as regards—Validity—Disbursements by borrower of amounts advanced—Vouchers of—Condition to furnish—Breach of—Rights of parties on—Compromise of litigation contemplated—Consent of lender and of borrower's vakil to—If a condition precedent—Property obtained by compromise—Creditor's rights over—Action at law—Assignment of fruits of—Validity—Fruits of action got by compromise—Fruits got by decree or verdict—Distinction—Non existent property—Agreement to assign—Property coming into existence subsequently—Assignees' rights in case of 94

——Agreement to finance litigation—Validity—Tests 646

——Maintenance—Legality of, in India. 96

Charge—Property sold in execution—Of Decree against benamidar and real owner—Alienation by benamidar—Consideration used to set aside sale—Equitable charge in favour of alienee 622

Chota-Nagpur Encumbered Estates Act, 1876, Ss. 3, 10, 12 to 21—Manager — Position status and rights of (P.C.) 562

Civil Procedure Code of 1882, S. 264—Possession given in execution under—Decree for possession in favour of one cosharer against another, with a declaration against jote right claimed by defendant—Fresh suit for possession and declaration by plaintiff — Limitation— Starting point—Limitation Act, Art. 142 (P.C.) 23

——Ss. 2 (2), 115. O. 32, Rr. 2 and 3—Minor applying to be impleaded as legal representative—Application without next friend—Dismissal—Impleading legal representative without notice to another claimant—Rival claims not adjudicated on—Order if revisable—Right of appeal—Order if amounts to decree ... 370

——S. 2 (12)—Mesne profits—Nature of—Basis of calculation—Burden of proof—Lands in the possession and cultivation of defendant—Allegation of cultivation at a loss for successive seasons—What plaintiff should prove. ... 730

——S. 10—Trial of later suit—Prior suit on same cause of action pending—Without jurisdiction ... 646

——S. 11—Constructive *res judicata*—Suit for partition by one brother against another—Dismissal of—Second suit by heirs of sister against brothers for share of inheritance—Dismissal on the ground that property belonged exclusively to plaintiff in first suit—Suit by heirs of plaintiff in first suit for possession—Partition—Amendment of plaint 20

——S. 11—Decree dismissing suit—Finding as between co-defendants—Not implied in decree nor embodied therein—Appeal if lies ... 612

——(V of 1908), S. 11—Hindu Law—Powers of widow to mortgage husband's estate-Suit by husband's reversioners to set aside mortgage—Subsequent suit by reversioners for possession—Agra Tenancy Act, S. 79—Grove land—Suit for—Limitation... 824

——S. 11—Issue—Heard and finally decided—Decision on immaterial issues—Not *res judicata* ... 532

——S. 11—Parties and representatives—Decision in suit by mortgagee against purchaser of hypotheca—Subsequent suit against person deriving title under former purchaser ... 728

——S. 11—Res judicata—Representative suit—Hindu widow—Alienation by—Declaratory suit by presumptive reversioners contesting validity of—Death of widow—Suit for possession by actual reversioners—Result of prior litigation res judicata .. 545

——S. 11 (Expl. IV)—Execution proceedings—Application for transfer of decree—Notice to judgment-debtor—Limitation—Failure to plead—Effect of—Application for recognition of transferee from decree-holder—If a step-in-aid of execution—Limitation Act, Art. 182 (5)—Attachment of decree before judgment — Injunction — Period if can be excluded—Limitation Act, S. 15 ... 4

——S. 13 (d)—Proceedings in a foreign court—Irregularity in service of summons—Cannot be set up—Total absence of service necessary to avoid foreign judgment. 356

———S. 13 (b) and O. 37—Decision on the merits—whether ex parte decree is whether decree in summary procedure is 356

———Ss. 16, 21—Mortgage suit—Territorial jurisdiction of Court—Alteration of, prior to final decree—Decree if valid—Jurisdiction—Test of—Principle of S. 21—If applies to collateral proceedings - Waiver of jurisdiction 449

———S. 21—Territorial jurisdiction—Want of—Supervening after suit instituted—Plea when to be taken—Waiver 418

———S. 21—Transfer of territorial jurisdiction—Effect on pending proceedings—Objection—Waiver—Appeal ... 192

———Ss. 47 and 135—Arrest in execution of decree—Exemption under S. 135, Civil Procedure Code, claimed by judgment-debtor—Appeal—Arrest in execution of two decrees—Legality of 678

———S. 47—Representative — Auction-purchaser in Court-sale—Prior attachment of property by another court—whether purchaser representative of judgment-debtor in the latter Court ... 714

———Ss. 47, 151 and O. 21, R. 90—Second appeal—When lies—Auction sale set aside under inherent powers of Court—Sale contrary to order of Court—Effect ... 549

———S. 48—Execution of decree—Evasion of arrest—Fraud—Limitation—Extension of time ... 428

———S. 63 (2)—Attachment by Courts of different grades—Sale by inferior Court earlier though attachment by it later—validity—Subsequent attempt to sell property in execution of a decree of superior Court—Application by purchaser in execution of decree of inferior Court to stop sale—Maintainability—Civil Pro. Code, S. 47—Enquiry on application—Scope of ... 720

———S. 92—Mosque—Interest direct in—Persons having—Regular worshippers in mosque ... 361

———S. 92—"Persons having an interest in the trust"—Insertion of — Object of Legislature ... 361

———S. 92 and O. 22, R. 3—Scheme suit—Appeal—Death of one of the relator appellants—Effect of—Abatement ... 745

———S. 92—Suit for scheme—Hindu temple—Grant of land—Lands-burdened with service—Absolute grant to temple—Dealings by trustees—Evidentiary value of—Scheme—Framing of—Provision for permanent supervision and control by Court—Undesirability of ... 714

———S. 92—Suit under—Maintainability—Plaintiffs having no interest in trust—Advocate-General's sanction to institution of suit—Effect ... 361

———S. 92—Temple public—Interest—persons having- Persons resorting to temple—Bare possibility of a person desiring to resort to temple—Distinction ... 361

———S. 92—Trust—Interest in Persons having—Chatram public—Founder's descendants in female line—If have "interest" in chatram—Descendants themselves never resorting to chatram—Effect ... 361

———S. 94 and O. 39, R. 2—Applicability to election inquiries ... 201

———S. 98—If applies when two Judges of a bench differ in a mofussil Small Cause Revision ... 881

———S. 100— Second Appeal—Finding fact—Interference—Grounds of reasoning unsupportable ... 503

———S. 100—Second Appeal—Question of law—Whether stipulation is by way of penalty—Contract Act. S. 74 ... 605

———S. 100—Second Appeal— Whether transaction a mortgage by conditional sale or an out and out sale—Question of law 385

———S. 105—Interlocutory order—Setting aside exparte decree—If and when may be attacked in appeal from the final order in the suit ... 641

———S. 115—Revision—Interlocutory order—Conditions of interference— Result of lower Court's orders wholly unnecessary—Irremediable damage to petitioner... 460

———S. 115 (*a*)—Revision—Dismissal of suit for default after preliminary decree—No jurisdiction to order (P. C.) 441

———S. 135—Exemption from arrest—Judgment-debtor arrested in execution of one decree and brought before the Court—If may be arrested in execution of another decree ... 678

———S 151—Remand—Inherent power to —Apart from provision of O. 41, R. 23—If Exists ... 552

———O. 1, R. 8—Object of—Applicability —Conditions—Right to sue in original plaintiff and community of interest between him and members of the class—Suit in name of wrong plaintiff—Effect—O. 1, R. 10—Applications of—Conditions—*Bona fide* mistake in institution of suit—Necessity—Pleadings—Amendment of, by introducing case of fraud—When granted and when not ... 540

———O. 3, R 4 (2)—Withdrawal of Vakalat—what amounts to—Leave of Court—Form of (F. B.) 398

———O. 8, Rr 4 and 5—Pleadings—Allegations in—Denial to be specific—Scope of the rule ... 520

———O. 9, R 2—Plaintiff—Non-appearance—Pleader asking for adjournment and

C. P. Code (V of 1908), O. 9, R. 9. PAGE.

reporting no instructions in case of its refusal—O. 3, R. 4 (2—Withdrawal of vakalat—What amounts to—Leave of Court for withdrawal—Grant of — Resumption — Conditions 398

———O. 9, R. 9—Execution proceedings—Applicability to—Execution sale—Petition to set aside—Dismissal for default—Application under O. 9, R 9, to restore application—Maintainability 269

———O. 9, Rr. 9 and 13—Appearance—Pleader reporting no instructions—whether amounts to—Setting aside order or decree (F. B.) 514 *also* 398

———O. 11, R. 14—Inspection of adversary's documents—Order permitting—Propriety—Conditions — Notice to opposite party—Necessity—Partnership— Declaration of right as partner and taking of partnership accounts—Suit for—Inspection by plaintiff of alleged partnership accounts—Order permitting, before commencement of trial—Inspection by employee in defendant's firm who had been won over by plaintiff—Revision—Interlocutory orders of Court below—Interference with—Conditions ... 460

———O. 21, R. 2 and O. 32, R. 6—Payment to one of several decree-holders—Decree if satisfied—Payment certified, but not recorded—Recognition of, by executing Court—Decree in favour of manager and minor members of a joint Hindu family—Payment to manager—Leave of Court not obtained—Effect of ... 498

———O. 21, R. 16, second proviso—Applicability of, to mortgage decrees 434

———O. 21, Rr. 58, 63—Claim petition—Dismissal for default—Court's power to restore—If affected by O. 21, R. 63 13

———O. 21, R. 63—Suit by defeated claimant to establish title—Benami sale—Burden of proof 14

———O. 21, R. 89—"Interest"—Son as reversionary heir father—Sufficiently interest to set aside sale ... 622

———O. 22, R. 3—Scheme suit under S. 92, C. P. C.—Appeal—Death of one of the relators—No abatement—Application to dismiss appeal — In-competent under O. 22 ... 745

———O. 22, Rr. 4, 9—Order setting aside abatement—Appeal—Order passed without jurisdiction—Effect of—Mortgage suit —Preliminary decree after death of mortgagor—No application to bring on record legal representative in time—Abatement—Application for final decree—Application to excuse delay in impleading legal representative—"Right to sue"—If applies to case after preliminary decree but before final decree ... 235

Company. PAGE.

———O. 23—Leave to withdraw suit on condition of plaintiff paying defendant's costs of suit—Suit subsequent for same relief without paying such costs—Maintainability—Payment of costs after close of trial of subsequent suit—Effect—Champerty —Agreement to finance litigation—Validity —Tests 646

———O. 32, R. 3—Order under—Appeal from—If lies ... 370

———O. 32, R. 4 (3)—Appointment of guardian for a suit—Consent of proposed guardian—Whether must be expressed—want of consent by proposed guardian, whether renders the decree in the suit a nullily ... 273

———O. 32, R. 6—Father guardian-ad-litem joint decree holder with minor sons—Payment only to father—Leave of Court not obtained—If decree discharged ... 498

———O. 32, R. 6—Hindu father — Next friend of minor sons—Decree in favour of both—Whether competent to give a legal discharge—Limitation Act, S. 7. 389

———O. 33—Application to sue as pauper Government not opposing—Defendant's right to prove that applicant is not a proper 932

———O. 33, R. 3—Pauper application—Presentation to Sherishtadar—If valid—Madras Civil Rules of Practice R. 14—If *ultra vires* 522

———O. 34, R. 14—Sale contrary to provisions of—Validity—Mortgage with possession and lease forming part of same transaction—Rent under lease—Decree for—Sale of mortgaged property in execution—Validity—Omission of judgment-debtor to raise plea of invalidity of order for sale in prior execution proceedings—Effect—Constructive res judicata—Applicability of rule of, to execution proceedings ... 798

———O. 38, R. 5—Attachment before judgment—Security—Suit dismissed by trial Court but decreed on appeal—Liability of surety 523

———O. 41, R. 23 and O. 43, R. 1 (u)—Remand of suit fully tried by 1st. Court—Appeal from order—If lies ... 552

Company—Winding-up—Orders in—Jurisdiction—Additional District Judge to whom functions of supervising liquidation has been assigned by District Judge—Jurisdiction of—Punjab Courts Act, 1888, S. 6—Effect ... 322

———Winding-up—Petition for—To put pressure on company to pay up disputed debts—Abuse of process of Court 710

———Winding-up—Sale by Official Liquidator—Sanction by Court of—Order granting—Setting aside of, on appeal—Propriety —Sale best thing under circumstances—Effect ... 323

Compromise—Binding character—*Consensus ad idem*—Necessity—Interposition of third party to fix amount—Conclusive or leading element in contributing to compromise—Parties not *ad idem* as to—Effect—Legal Practitioner - Counsel—Compromise by—Power of—Compromise leaving amount to which client is entitled to be fixed by Counsel for other side—Express authority for-Necessity 136

Consent Order—Appointment of receiver—Open to question in case of malfeasance, or if in practice it proves so protracted or imperfect as to be futile (P.C.) 286 *at* 293

——Setting aside of—Grounds—Consent by advocate under mistake of fact—Partners—Purchase of property by, which in partnership—Properties—Partnership properties or properties owned by purchasers as co-owners—Appeal--Judgment under--Correctness of—Presumption—Onus on appellant ... 164

Contract—Building contract—Commission to owner of 10 per cent. on cost of materials used—Right to—Original contract stipulating for such commission subsequently substantially varied at instance of owner—No stipulation for commission in new contract—Effect 180

——Enforceability—Sale of land—Agreement by vendee to discharge debt of vendor—Right of suit—Privity of contract—Rule as to—Exception—All parties before Court—Effect ... 517

——Novation—Partnership -Debt due by—Mortgage by one of partners for—Effect—When no extinguishment of firm's debt or release of partners' liability for it 168

——Right to put an end to—Breach of contract—Putting an end to contract by committing 96

——Specific performance—Execution of further document contemplated—Whether condition or term of bargain—Or only manner of fulfilment of completed contract (P.C.) 562

Contract Act, S, 65—Applicability to cases of chit-fund—lottery 876

——S. 74--Partition--Annuity to a sharer, with clause of proper share to him in case of default—If penal ... 605

——S. 74—Penalty—Chit Fund—Subscriptions payable monthly—Provision for payment of whole of the arrears in case of default in payment of instalment ... 833

——S. 74—Penalty clause—Unenforceable by person who has suffered no loss (P. C.) 145

——S 91—Applicability — Commission agent and principal—Despatch of goods by rail—Absence of insurance—Usual course of business — Loss—Liability for—Legal position of parties—Interest Act—If exhaustive—Award of interest—Discretion ... 312

Contribution—Suit for—Joint tort feasors—Who are—Failure to prove common defence set up—Effect of 305

Co-owners—Community of interest necessary—Several ryotwari holders under a single patta not co-owners, Trusts Act, S. 90 755

Co-sharers—Enjoyment of common property—Mode of—Exclusive user by one—Right of others in case of—No ouster by such user—Partition—Remedy of, available to co-sharer—When sought—Decree against co-sharer in exclusive possession—Mesne profits—Compensation—Decree for—Propriety—Jote rights in hands held in common—Co-sharer if can obtain as against his co-sharers—Co-sharer if can create such rights by letting—Purchase of Jote rights in common lands by co-sharer—Effect (P.C.) 23

Counsel—Compromise—Authority—To refer cause to the decision of opposite counsel—Whether must not be express (P C.) 136

Courts—Subordinate Courts—Duty to follow precedents of own High Court ... 840

Court Fees Act, S. 31—Fees ordered to be paid under—Whether amount to enhancement of sentence ... 355

——Sch II, Art. 17 (iii)—Scheme suit—Prayer for temporary mandatory injunction to compel deft. to deposit amount in Court *Ad valorem* Court fee if payable thereon ... 656

Criminal Procedure Code, S, 106—Security to keep the peace—"Offence involving a breach of the peace"—Meaning of—Conviction under S. 342, I. P. C.—Order under S. 106, Cr. P. Code, if legal ... 232

——S. 110—Proceedings under S. 112—Notice under—Validity—Conditions—Defects in notice—If cured by explanation given by Prosecuting Inspector at commencement of trial—Object of notice under S. 112—Joint trial in proceedings under S. 110—When had ... 689

——Ss. 144 and 439—Time-expired order—Revision—No interference ... 439

——S. 198—Person aggrieved—Defamation of wife—Inputing unchastity—Husband if may prefer a complaint 746

——S. 421—Criminal appeal—Hearing of at time of presentation of appeal—Legality—Posting for hearing under S. 421—Lapse of reasonable time—Original records of Court below containing depositions—Necessity—Legal Practitioner—Misconduct—Practitioner who drafted memo. of appeal—Failure to argue appeal at time of presentation of appeal ... 661

——S. 423 (*d*)—Appellate Court—Court fees of complainant—Order directing payment of, by accused—Validity—Order if an enhancement of sentence—Court-fees Act, S, 31 355

——Ss. 435, 438 and 439—High Court—Power of revision—Proceedings pending

Cr. P. Code, S. 491. PAGE.

before subordinate Criminal Court—Charge of criminal misappropriation—Stay of proceedings pending decision of Civil Court... 373

————S. 491—Application under—Of the nature of habeas corpus ... 614

————S. 520—District Sessions Judge—If a Court of appeal, confirmation, reference or revision—Order of Second Class Magistrate—Appeal to Sub-Divisional Magistrate—Order if can be varied by Sessions Judge. 481

————S. 537—Defective charge—Omission of S. 149, I. P. C.—If cured (F.B.) 221

Declaratory suit—Cause of action—Option of plaintiff to choose—Proceedings throwing cloud on title—Not amounting to adverse possession or enjoyment—Any may be chosen ... 379

Decree—Preliminary decree—If suit can be dismissed for default after. (P. C.) 441

Deed—Construction—Bill of sale—Thavanai Meaning of—Credit period—Words—Interpretation—Technical meaning—Evidence of—Evidence Act, Ss. 92 (5) and 98—Limitation for suit for money due ... 844

————Construction — Compromise agreement in nature of settlement—Estate in reversion—Grant of—Life-estate or absolute estate—Absolute estate—Grant of—Provision derogating from—Legal incidents of grant—Mistake in statement as to—Effect—Heirs and representatives—Words of limitation or of purchase—Hindu Law—Will—Father—Bequest of self-acquired property to son—Nature of property in son's hands, ancestral or self-acquired—Mitakshara family—Deed—Construction—Maxim *ut res magis valeat quam pereat*—Applicability—Oudh Estate—Succession—Rules applicable to—Transfer to person in line of succession but not immediate successor—Effect ... 260

————Construction—Deed of gift by Hindu husband to his wife—Donee's estate—Description of donee as *malik—Istamrari mokarrari* lease granted by donee ... 585

————Construction— Evidence—Surrounding circumstances—Reference to—Permissibility 96

————Construction—Sale of building sites—Intended pathway—Rights of vendees... 477

Deed of mortgage by conditional sale—Contemporaneous deed of sale of same property, with collateral agreement for reconveyance on repayment of consideration money—Construction—Surrounding circumstances—Transfer of Property Act (IV of 1882), S 58—Evidence Act (I of 1872), S. 92 ... 809

Disqualified proprietor—Estate under management of manager appointed under Chota Nagpur Encumbered Estates Act, 1876—Dealing with estate—Person having right of—Manager—Position, powers and duties of, under Act—Agreement regarding estate under management of Manager—Manager not party to—Specific performance of agreement—Suit for—Maintainability—Contract — Construction—Further contract—Execution of—Provision for condition precedent—If and when a—Nonfulfilment of condition—Enforceability of contract—Effect on ... 562

Easement—Right of way—Implied grand—title-deed of dominant tenement—Boundary— Description as pathway—Site belonging to vendor 477

Easements Act, S. 13 (b)—Sale of portion of land—Irrigation facilities—Easement of necessity 302

Election of remedies—Principle of—Only applicable in the case of alternative liability on the same cause of action 85

Estates Legal and equitable theory of—Not party of Hindu Law (P. C.) 401 *at* 405

Estoppel—Mortgagor and mortgagee—Mortgagor's title to mortgaged property—Denial by mortgagor—Permissibility 258

————Onus—Proof of facts and circumstances—On person setting up. (P.C.) 591

Evidence Act, S. 112—Legitimacy—Presumption—Conception during continuance of prior marriage—Birth after re-marriage... 155

————S. 115—Suit for possession—Under-proprietor (*pukhtadar*) — Compromise decree—Mutation of names in Register—Payment of rent and acceptance by the Court of Wards—Subsequent discovery of error—Effect 591

Execution proceedings—*Res judicata*—Constructive—Not applicable 798

Family arrangement—Dispute between heirs of a deceased person—One of the heirs consenting to his share being given to his minor son—Award—Validity of settlement in favour of minor ... 928

Foreign Court—Submission to jurisdiction of—What amounts to—Power-of-attorney empowering agent to represent principal in litigations in that Court—Execution of—Effect—Foreign judgment obtained on merits—Judgment delivered *ex parte* if and when a—Notice of suit to defendant—Irregularity in service of, not a ground for attacking decree—Decision of foreign Court as to sufficiency of service—Correctness of—Presumption ... 356

Forest Lands in South Canara—Ownership of—Vests in the Government (P.C.) 35

Forfeiture - Junior members of tarwad in possession of lands for maintenance—Denial of tarwad's title in a karar—Admission of tarwad's title in the written statement in the suit—whether prior denial works forfeiture ... 695

Gift. PAGE.

Gift—Consideration—Past and future cohabitation—Document drafted as sale-deed—If can be set aside—Purpose carried out—Effect ... 652

Grant—Of absolute estate—"Heirs and representatives"—words of limitation—Or words derogating from the grant—Ineffective (P. C.) 260 *at* 266

Guardians and Wards Act, S. 43 (1)—Scope of—Court if can pass order against stranger—*De facto* guardian—Order against—Validity of ... 655

Habeas Corpus—Guardian *de jure*—Application by, in respect of child detained against his will—Considerations applicable to case of—Infant a boy over 14 or a girl over 16—Wishes of infant if must be given effect to in case of—Law in England and in India ... 614

High Court—Judge of, absent on other service—If ceases to be a Judge of the Court—Full Bench judgment—Validity—One of Judges absent on other duty when judgment was pronounced—Effect ... 397

Hindu Law—Adoption—Sudras of the Madras Presidency—who may be adopted—Married person ... 776

————Gift—Widowed daughter-in-law—Gift by father-in-law—Life-estate conferred—Remarriage of widow—Effect on gift—Hindu Widows' Remarriage Act, S 2 ... 1

————Guardian—Sale of minor's property—Validity—Portion of sale price agreed to be left with vendee to be paid by him to the minor on his attaining majority—Vendee executing bond therefor—Sale if rendered invalid thereby—Vendor's lien if lost by reason of such arrangement 737

————Inheritance—Bandhus — claiming through males and females respectively—No preference ... (P. C.) 401

————Inheritance—Bandhus —Preference to males ... (P. C.) 401

———— Inheritance—Exclusion from—murderor of last owner—whether forms a stock of descent—whether take a legal estate—Justice, equity and good conscience...(P.C.) 401

————Joint family —Father—Gift by —Validity against son—Condition—Gift to wife or to mother—Gift to daughter—Distinction 465

———— Mitakshara—Father's bequest to son—whether property in latter's hands self-acquired or ancestral—Quaere ... (P. C.) 260

————Partition—Annuity granted to one of the members in lieu of share—Provision for resumption of share in default of payment of annuity—Penalty—Relief against—Contract Act, S. 74 605

———— Succession— Priority among Bandhus—Conviction for murder as a disqualification from inheritance — Public policy—Distinction between legal and equitable estates inapplicable ... 401

Injunction. PAGE.

————Widow—Alienation by—Presumptive Reversioners—Declaratory suit—Decree in—subsequent suit for possession by actual reversioners—*Res judicata*... (P. C) 824

————Widow—Alienation—Suit by presumptive reversioner challenging—Representative nature of—Death of widow—Suit by actual reversioner for possession—If barred—Civil Procedure Code, S. 11, (Expl. VI) ... 545

———— Widow—Mortgage by—Suit to enforce, against reversioner—Plea by him of no necessity for bond—Scope of—Plea of no necessity for high rate of interest if included—Onus on mortgagee of proving such necessity—Shifting of onus—Conditions—Evidence of necessity for high rate of interest—Borrowing by same widow on other occasions at high interest if ... 329

————Widow —Re-marriage— Effect on prior gift by father-in-law — Hindu Widows' Remarriage Act, S. 2 1

————Will—Construction—Bequest to wife and daughter with right of survivorship to each other—" If a male is born to my daughter, it will inherit real property given to my wife and daughter "—Estates taken by wife and daughter and daughter's sons—Nature of—Only son of daughter born after testator's death and dying before daughter—Effect—Validity of bequest to daughter's sons—Madras Act I of 1914—Applicability—Effect ... 377

————Will—Construction— Vesting—Life estate to daughter with remainder to her son—Vesting of estate in son—His surviving his mother if a condition precedent ... 310

————Will—Construction — Woman—Bequest to—Estate conveyed—Presumption—"Enjoy" if imports limited estate—Bequest by person having absolute estate—Estate conveyed--No words limiting estate given—Effect 723

————Woman—Gift to—If confers only limited estate—Presumption—None ... 723

Hindu Widows' Remarriage Act, S. 2—Gift by father-in-law—The daughter-in-law becoming a widow and remarrying—Devesting—None 1

Inam—Service inam in an Estate—Dharmila inam—Resumption—Right of landholder to levy full assessment ... 558

Income-Tax Act—Super-tax—Liability for undivided profits—Capitalisation of—Bonus shares newly issued on basis of—Super-tax on value of—Shareholder's liability for ... 242

————S. 10, Sub-S. 2, Cl. (9)—Company—Profits — Business allowance—Tax on companies—Madras District Municipalities Act (V of 1920), S. 92 ... 160

Injunction—Temporary—Power to grant—If conferred upon the Judge trying—Election disputes—Madras Election Rules, R. 6 ... 201

Insolvency. PAGE.

Insolvency—Of assignee of arrears of rent—Assignor entitled to half the net collections—Assignee a trustee—Official receiver in the same position ... 528

Interest—Compound interest—stipulation for—In default of punctual payment—not a penalty—Contract Act, S. 74 910

Interest Act—Not exhaustive 312

Joint promisees—Promise (not payment) to one—whether prior promise discharged... 840

Kumri Cultivation—Forest tracts in Canara—Nature and incidents of—Rights of cultivators and Government (P. C.) 35

Land Encroachment Act (III of 1905) Ss. 6. 14—Notices to quit under S. 6, without actual eviction—Suit by party aggrieved by, to establish title—Limitation—Starting point—Plaintiff's right to elect any one of notices as affording cause of action so as to save limitation—Proceedings under the Act within meaning of S. 14—Proceedings not amounting to eviction if included ... 379

Landlord and tenant—Covenant against alienation—Forfeiture clause—Alienation of portion of lease property—Effect of—Principles of construction. 307

————Ejectment—Burden of proof ... 558

————Ejectment—Service inam—Resumption—Right to eject—Assessment of full rent 558

Lease—Construction—Religious endowment—Trustee—Absence of words importing permanency—Duration of lease ... 256

Letters Patent, Cl. 36—If applies when two judges of a bench differ in a mofussil small Cause Revision 881

Limitation Act, S. 5—Rule framed by the Madras High Court—Extension to applications under O. 9. R. 13, Civil Procedure Code—Rule if *ultra vires*—"By any enactment or rule"—Change in language by Act X of 1922—Effect ... 409

————. S 7—Joint decree-holders—Hindu father and minor sons—Father next friend and guardian in the suit—Capacity to give discharge—Civil Procedure Code, O. 32, R. 6—Execution application—Limitation—When commences 389

————S. 15—Attachment before judgment of a decree—Effect of—Injunction not to execute—Period during which attachment in force—If may be deducted in computing time for execution application ... 4 *at* 7

————S. 18—Fraud—Continuing fraud—Sale in execution of exonerated party's property—Suppression of notice ... 535

————S. 19—Acknowledgment—Promise to pay unnecessary 840

PAGE.

Madras City Tenants' Protection Act (III of 1922), S. 9.

————Art. 89—Pleader and client—Death of pleader—Suit for accounts against sons—Agency—Cause of action—Pleader if general agent 483

————Sch. I, Art. 120—Suit by *wargdar* to set aside order of Government rejecting claim to *Kumries* and for declaration of his right—Applicability (P. C.) 35 *at* 47

———— Arts. 132 and 148 — Mortgages — Prior and subsequent—Suit by prior mortgagee—Puisne martgagee not impleaded—Sale and purchase by assignee from prior mortgagee—Subsequent suit by puisne mortgagee—Purchase in execution—Suit for redemption—Limitation 602

————Arts, 137 and 138—Suit by auction purchaser for redemption—mortgage to defendant by judgment debtor pending attachment—Void under S. 64, C. P. C.—Suit barred ... 913

————Art. 181—Restitution by party who was exonerated from decree but whose property was nevertheless sold—Application for—Limitation—S. 18 of Limitation Act—Case under—Allegations necessary for raising ... 535

————Art. 182—Application to revive pending execution—Limitation—Starting point—Joint decree—Application to execute against some judgment-debtors—Saving of limitation against others 608

————Art. 182—Execution of decree—Limitation — Step-in-aid of execution — Batta for process—Payment of—Batta memo. not applying for issue of process—Effect ... 537

————Art. 182 (Expln. 1)—Decree passed jointly, etc—Whether a decree passed partly jointly and partly, severally is one ... 608

————Sch. I, Art. 182 (5)—Step-in-aid—Petition by assignee of decree to recognize the transfer and to execute—Whether step-in-aid—Assignment subsequently held invalid—Whether the prior application one made in accordance with law 4 *at* 6

Madras Act (I of 1914)—Applicability—Devisee in remainder unborn at testator's death—Subsequent birth and death of before 1914—Vesting of remainder—Void—Tagore case—Whether the Act conferred estate or remainder-man's heir on death of life—Tenant ... 337

Madras (Administration of Estates) Regulation III of 1802, S 16, cl. 7—Scope of—Duty of Court—More than one claimant to the estate of the deceased—Jurisdiction to decide on rival claims ... 770

Madras City Tenants' Protection Act (III of 1922), S. 9—Applicability—Tenant against whom decree in ejectment had been obtained but who had not been actually ejected in execution at date of Act—Right to apply for sale of 350

Mad. City Ten. Prot. Act (III of 1922), S. 9. PAGE.

———S. 9—Tenent in possession of temple land—Right to compel trustee to sell the land 211

Madras Civil Rules of Practice, R. 14—If *ultra vires*—C. P. Code, O. 33, R 5 ... 522

Madras District Municipalities Act (V of 1920), Ss. 54 (b) (ii) and 59 (c)—Offence under—Deposit—Object of—No costs or compensation ordered—Deposit to be returned 199

———S. 92—Municipal tax—Whether may be deducted as business allowance—Income Tax Act, S. 10 (2), cl, 9 160

———S. 182—Powers of Municipal Council under—Wall not built upon public street—Removal of—Order for—Validity—Land encroached upon once a street, but accused in possession thereof for over statutory period—Removal of encroachment in such a case—Order for—Validity—Distinction—Accused's right in such a case—Law under Act IV of 1884 and under Act of 1920—Distinction. ... 470

———S. 303—Rules framed under—R. 6—Enquiry into election dispute—Power of Court to issue interim injunction—Discretion—C. P. Code, S. 94 and O. 39, R. 2—Applicability of 201

———Rr. 1 and 7 (1)—Candidate deemed to be duly elected under Rule 7 (1)—Validity of election of—Dispute as to—Decision of—District or Sub-Judge—Jurisdiction—R. 1—Scope of 762

———R. 8 (e)--Election dispute—Revising authority—Admission of claim by—Validity of—If can be questioned in election dispute—" Preparation" in R. 8 (e)—Meaning ... 795

Madras Estates Land Act—Ryoti land—"Cultivable" usually and ordinarily cultivated ... 469

———S. 3 (d)—Applicability—Small plot of land—Suit by inamdar against tenant—Rights of parties—Considerations—Permanent occupancy rights—Payment of uniform and fixed rent—Inference—Kandayam—Meaning of ... 598

———S. 3 (5)—Darmilla inam lands—Suit for possession by inamdars against tenants—Jurisdiction—Civil or Revenue Courts—Inamdars alleging to be originally kudivaramdars only—Subsequent grant of melvaram—Effect of 393

———Ss. 8 (4), 153, 157 and 189—Landholder purchasing kudivaram interest in holding—Ejectment of non-occupancy ryot under time—Expired lease for one year—Jurisdiction of Civil Court—Benamidar—Right to sue in ejectment. ... 415

———S. 153—Exhaustive only of grounds of ejectment before Collector. (F. B.) 415

———S. 163 (2)—Mesne profits—Waste land usually submerged in water--If ryoti land—Civil Court—Jurisdiction ... 469

Minor. PAGE

Madras Local Boards Act (XIV of 1920), S. 55 (2) (iv)—Disqualification for election—Honorary Magistrate — Resignation of office—If removes disqualification—Acceptance by Government necessary 774

———(V of 1884), S 73, (Proviso)—"Tenant"—Meaning of—Licensee from inamdar—Payment of local tax by intermediate landholder—Right to recover from licensee ... 383

Madras Regulation (X of 1831), S. 2—Sale of minor's estate—"Regular course of inheritance"—Meaning of—If excludes survivorship—Madras Revenue Recovery Act (II of 1864), S. 63—Effect of—Unregistered landholder ... 667

Madras Regulation (XXV of 1802), S. 4—Lakhiraj lands—Lands exempted from payment of revenue—Possibility of yielding revenue necessary—Presettlement--Cattle-paths in a Zemindary not lakhiraj 781

Madras Revenue Recovery Act (II of 1864), S. 63—Effect on operation of Regulation X of 1831—Whether sale of minor (unregistered) landholder's property void 668

Malabar Law—Mahomedans following Marumakkatayam law—Gift to daughter—Incidents of tarwad property 679

———Nambudris — Law applicable — Special usage—Pleading and proof—Nambudri *illam*—Mortgage by step-mother of family property—Necessity—Existence of, if validates mortgage 68

———Tarwad and tavazhi— Acquisitions by Karnavan—Presumption—Allotment of tarwad property for maintenance by Karnavan—Right of junior members to set aside—Denial of rights of tarwad in tavazhi karar—If works out forfeiture ... 695

Maxim—*Cujus est dare ejus est disponere*—Hindu Father's power to decide whether legacy to son should be ancestral or self-acquired in latter's hands (P. C.) 260

———Memorandum allegens *turpitudinem suam est audiendus*—Applicability in case of a joint fraudulent defence by several defendants—Suit by a defendant against co-defendants for contribution in respect of costs 305

———*Ut res magis valeat quam pereat*—Construction of deeds—When to apply the principle (P. C.) 260

Minor—Agent appointed by guardian—Suit against agent—If maintainable 205

———Decision in suit by or against—Res judicata—When not—gross negligence of guardian—What is 700

———*De facto* guardian—No authority to mortgage even for necessity 686

———Guardian— Contract for sale of immoveable property — Enforceability — Subsequent sale to another for higher

price—Rights of vendee under prior contract—Specific performance ... 683

———Writ of habeas corpus—Welfare of the infant governing consideration — Wishes of the minor—When considered... 614

Mortgage—Consideration—Onus of proof of —Suit to enforce mortgage—Transfer of Property Act, Ss. 86-90—Mortgage—Consideration for it being payment of debt due to third party by mortgagor—Non-payment thereof by mortgagee—Effect—Suit by mortgagee to enforce mortgage- Maintainability—Right to decree for sale 168

———Consideration unpaid for—Suit for—Maintainability—Mortgagor's right to obtain damages in such case—Transfer of—Validity—Transfer of Property Act, S. 6 (e) 435

———Construction — Personal liability—Fiduciary capacity—When can be presumed—Election of remedies - Estoppel 85

———Decree under O. 34, R. 4 of Civil Procedure Code— Receiver of property under mortgage—Effect of appointment of —Action by Receiver against decree-holder for account and possession ... 294

———Interest due under—Charge on property in respect of—Rule—Exception—Deed displacing general rule—Construction. 64

———Joint mortgagees--Subsequent undertaking to pay amount to one mortgagee—If a valid discharge—Rulings of High Court—How far binding on subordinate Court—Fraud —Case not set out in pleadings—New case if allowable in appeal—Limitation Act, S. 19—What amounts to acknowledgment. 840

———Moveables—Sale of hybotheca by owner—Purchase of similar articles—Mortgagee's lien if attaches to new article. 704

Mortgage suit—Final decree in—Application for—Limitation—Civil Procedure Code, S. 105—*Ex parte* decree—Propriety of—If and when can be questioned in appeal from final decree in suit—Mortgage suit—*Ex-parte* decrees preliminary and final in—Order setting aside final decree while retaining preliminary decree—Propriety of—If can be questioned in appeal from final decree. ... 641

Negotiable instrument — Promissory note —Suit by endorsee against maker and endorser— Liability of—Presentation for payment—Notice of dishonour—Cause of action—Limitation — Payment of portion of amount by maker—Effect 475

Negotiable Instruments Act, S. 29—Executor —Guardian—Pro-note by—Personal liability under—If and when excluded—Note for debt binding on estate or minor's estate if decisive— Hindu Law—Joint family property—Father—Will appointing guardian of property for minor son—Validity 765

Occupancy rights (jote)—In lands held in common by co sharers—If can be acquired by a co-sharer as against other co-sharers—By prescription or by purchase—If can be created by a co-sharer letting such lands (P. C.) 32

Partition suit— Preliminary decree—Final decree—Proceedings for passing of—Plaintiff's default to take—Order to be made in case of—Dismissal of suit on ground of such default -Jurisdiction—O, 17, R. 2, Civil Procedure Code—Revision against order of dismissal—Interference in—Civil Procedure Code of 1908, S. 115 (a) and (c)—Applicability ... 441

Partnership—Dissolution—Agreement at ; by which firm's business and liabilities are taken over by one of the partners—Creditors not parties to—Effect of agreement upon, and upon partners *inter se* 168

———Malabar tavazhi— Karnavan of—Partnership trade by, with third parties—Other members of tavazhi—Rights of, so long as partnership is a going concern—Rights on dissolution—Surrender of interests of tavazhi by Karnavan under dissolution arrangement—Validity against other members—Suit by them for recovery of their rightful share in partnership—Maintainability ... 554

———Suit by partner to recover money due in respect of partnership – Limitation—Suit for accounts barred—Suit on judgment—Maintainability. ... 829

Patta—Not a document of title or deed of grant—Merely record of Government demand ... 503

Penal Code, S. 161—Essentials of offence—Karnam receiving bribe from villager for getting darkhast land—Official act—If an offence ... 662

———S. 182—Application for transfer of criminal case—Affidavit by third party handed over to pleader and filed by him in Court—If amounts to information to public servant. ... 658

——— Ss. 326 and 149—Charge under—Conviction under S. 326 alone—Illegality —Irregularity coming under S. 537, Cr. P, Code—S. 149, I. P Code—Object of—If creates an offence—Conviction under section without a charge —Illegality—Irregularity —Ss. 148 and 326—Rioting—Conviction for—Legality—injunction restraining accused from interfering with complainant's possession—Entering upon land in disobedience of—Remonstrance by complainant—Attack by accused and injuries caused thereby- Conviction in case of ... 221

——— S. 353—Public servant acting in discharge of duty—Distraint warrant authorising distraint of property of defaulter—Attempt to distraint property of lessee of defaulter—Assault of person entrusted with warrant by lessee—Conviction of lessee for—Legality ... 447

———S. 441—Criminal trespass—Essentials of offence of—Intention to commit offence, etc.—Necessity—Prior unregistered sale-deed accompanied by possession—Subsequent registered sale-deed—Which prevails—Land under Rs. 100 in value ... 437

———Ss. 449, 500—Religious controversy—Personal character or respectability not assailed—Violent language—Defamation... 664

———S. 499—Defamation — Accused if must actually utter defamatory words—Use of such words by another and accused adopting them if enough—Married woman—Imputation of unchastity to—Complaint by husband—Right of—Penal Code, S. 499—Criminal Procedure Code. S. 198—Effect 746

———S. 499—(Exception 9)— Defamation—Sectarian disputes — Excommunication of a member of a community—Publication in the course of duty—Good faith... 8

Permanent tenancy —Adverse possession — Acquisition by—Whether possible in favour of tenant (P. C) 248

———Long holding at a low and unvarying rent—Inference 598

Pleader—Admission on question of law—If party bound 415 at 417

———Engaged in a number of suits—If a general agent—Limitation Act, Art. 89 ... 483

Pleadings—Amendment of—Allowed in second Appeal—Cause of action misconceived—Amendment of plaint on terms all costs up to date be paid by plaintiffs—Defendants to file new statements 20

———Mortgage by Hindu widow—Suit on—Plea by reversioner of no necessity—If includes plea of want of necessity for high rate of interest (P. C.) 329

———Plaint—Amendment — Hindu Law—Suit for partial partition—Not maintainable—Amendment of plaint allowed in second Appeal—Terms 908

Poromboke—Jungle stream passing through survey field—Patta granted—If includes water channel—Liability of pattadar to pay water cess—Riparian rights—Mixed question of fact and law ... 503

Practice— Evidence—Suit different— Evidence in—Admission of, despite objection by defendant—Legality—Judgment based on such evidence—Setting aside of 640

———High Court— Finality of order—Appeal from final order— Company — Winding up—Enforcement of payment of disputed debt—Abuse of process of Court. 710

———High Court — Interference by—Order complained of expired— Whether adjudication necessary 439

———Suit—maintainability--Plaint allegations alone to be looked into ... 671

Presidency Towns Insolvency Act (III of 1909.) Ss. 2, 17 and 52—Order adjudication undivided Mitakshara Hindu father insolvent—If son's undivided shares vest in the Assignee (P. C.) 857

Principal and Agent—Insolvency Court and Receiver—Sale by latter of insolvent's property—Subsequent vesting order—Ratification ... 749

———Pleader for several suits—If general agents—Limitation Act, Art. 89 ... 483

———Suit by agent for account—Claim for interest—Trade usage—Not excluded by Interest Act. ... 312

Privy Council—Appeal—Costs of—Successful appellant—Disallowance of costs to—Respondents unrepresented to appellant's knowledge—Delay in bringing appeal to hearing to consult appellant's interest as to advisability of prosecuting appeal. ... 323

———Appeal—Death of parties—Representatives not impleaded—Effect of decree—Addition of such representatives—Limitation—Limitation Act, Art. 181 ... 154

———Practice—Costs—Record in a state of confusion—Solicitor's fee for perusing the record—Disallowance. (P. C.) 562

Provincial Insolvency Act (III of 1907), Ss. 2 (e) and 16—Joint Hindu family—Father and sons—Insolvency of father—What vests in Official Receiver—Property or power of disposal—Sons' right to impeach binding nature of debts—Adverse finding—Decree in favour of party—*Res-judicata* 487

———Ss. 16 (5), 31—Insolvency of mortgagor—Sale by Official Receiver free of incumbrances—No actual consent by mortgagees—Application to set aside sale dismissed—Suit to enforce mortgage—Maintainability ... 16

———(V of 1920), Ss. 2 and 27—Joint Hindu family- Father adjudged insolvent—Sons' interest if vests in Official Receiver—Suit for partition by son—Maintainability of—Sale of property by Official Receiver prior to passing of vesting order by Court—Rights of purchaser—Order vesting property in Official Receiver—Ratification—Title by estoppel—Transfer of Property Act, S. 43. 749

——— S. 5—Interim protection to person who has applied to be adjudicated insolvent—Grant of—District Judge—Power of—Order declining to grant protection—Interference with, in appeal—Conditions ... 783

———Ss. 5. 23 and 31—Interim protection before adjudication—Power to grant ... 530 (Contra) 783

———S. 9—Deed of arrangement—Assent of creditor—Effect—If deed can be relied on as act of insolvency ... 495

———Ss 23 and 31—Insolvency—Right to apply for protection before adjudication ... 530

Pro. Insolvency Act (VI of 1920), S. 37. PAGE.

———Ss. 37 and 56—Adjudication — If vests insolvent's property in the Receivor —Vesting Order—Necessity of ... 749

———S. 39 (4)—Rules framed by the Madras High Court—R. 21 (b)—Creditor —Claim for final dividend—Notice—Form of—Strict compliance necessary 240

———S. 51 (1)—Assets realised after the date of the admission of the insolvency petition—Sale held before such date—Rights of execution creditor ... 759

———S. 53—Voluntary transfer—Transfer by son in favour of father—Payment of existing debts or transferor—Provision for mintenance—Insolvency of transferor—Transfer when liable to be set aside—Fraud on future creditors—*Bona fide*—Valuable consideration—Burden of proof ... 431

Receiver appointed by Court on application of judgment-debtors—Consent of decree-holder—Powers and duties of such Receiver—*Res-judicata*—Civil Procedure Code, 1908, S. 11—Civil Procedure Code, 1877 (Act X of 1877), S. 13—Consent order ... 286

Registration Act, S. 77—Scope of enquiry by Court—Duty of Registration Officer when documents are presented 271

———S. 77—Suit for compulsory registration—Decree in—Appeal—Power of Appellate Court to direct stay of registration ... 735

Religious endowment—" Devadayam " lands —Grant to the deity and not to Archakas—Long user by the latter—Evidentiary value —Only in absence of evidence as to the terms of the grant ... 714

Religious endowment—Trustee—Lease by—Absence of words importing permanency —Duration of lease 256

Remand—Order of — Appeal from—Order under O. 41, R. 23—Order under inherent power of Court—Distinction 552

Res-judicata—Constructive—None in execution proceedings ... 798

———Execution proceedings —C. P. C., S. 11. (Expl. IV)—Might and ought—Limitation not pleaded in a prior execution petition— Plea not open in a later petition filed within 3 years 4 *at* 5

———Interlocutory orders—C. P. C., S. 11 —Principle of—Applicability ... 286

———Issue unnecessary — Finding on—Party insisting upon decision on issue—Decision of Court in pursuance of—Decree not expressly embodying finding, but consistent therewith—Effect (P. C.) 23

———Minor—Decision in suit by or against—*Res judicata* against minor—Conditions—Gross negligence of guardian *ad litem*—What constitutes—Omission to rely upon a judgment in support of plea of *res-judicata* if gross negligence—Second appeal — Gross negligence of guardian

Trade-mark. PAGE.

ad litem—Finding as to—Interference with —Jurisdiction 700

Revenue authority — Order by—Should be after notice to party against whom made—Setting aside in Civil Courts—Prejudice to be shown ... 755

Revenue Recovery—" Defaulter "—Lessee of pattadar—If is one ... 447

Revenue Settlement—Lands assessed as dry —Rates if can be altered during period of settlement—Levy of enhanced rate—Suit against Government—If lies—Revenue Recovery Act, S. 58—If a bar ... 780

Sale-deed—Misrepresentation that it was a mortgage-deed obtained by—Evidence—Registration—Attestation to be appended at —Statement by vendor in, that he had signed deed not as sale-deed, but as mortgage—Inference of misrepresentation from —Propriety ... 128

Specific Performance—Contract by minor's guardian for sale of property—Binding purpose—Enforceability — Against subsequent vendee for higher price 683

Specific Relief Act, S. 42 (Proviso)—Consequential relief—Suit for declaration of plaintiffs' right as trustees of a Hindu temple and for injunction—Prayer for possession of temple and its properties if necessary. 671

Stamp Act (II of 1899), Ss. 26 and 35—Mining lease—Claim for royalty exceeding amount covered by stamp on lease—Payment of deficient duty and penalty 300

Statute—Construction — statutes regulating succession or Wills—How to be read—Not as affecting paramount questions of public policy or depart from well-settled principles of jurisprudence. (P. C.) 401 *at* 405

Subrogation—Mortgage prior—Decree on—Sale in execution—Puisne mortgagee's payment to avert—Subrogation to prior mortgagee's rights— Puisne mortgagee's right to—Nature and extent of rights acquired by subrogation—Prior mortgage as mortgage charge or as decree charge—Limitation to enforce right—Suit or execution proceedings — Appropriate procedure to enforce right of subrogation is such case—Decree of prior mortgagee satisfied by puisne mortgagee's payment—Effect 316

Succession Act, S. 107 and Exception— No ascertained fund—Income not given to legatee—Exception in applicable (P. C.) 850

Survey Manual—Merely directions to survey officers—No force of law 603

Trade-mark — Infringement — Importer of goods manufactured by another—Reputation of—If can be acquired—Infringement of right of importer—Action for—Maintainability—Manufacturer being sole importer—Sale in competition with—If and when actionable — Trade-mark — Passing off of goods—Principles of Jurisprudence as to —Applicability in India 69

PERTY ACT, S. 6. PAGE.

...ty Act, S. 6 (e)—Right to ...—Suit for money unpaid ...y mortgagor's assignee—...ssignment bad ... 435

...e by Official Receiver—Sub ...order—If relates back to ...e date of sale ... 749

——S. 55 (4)—Vendor's lien—not excluded by a pronote being taken for balance of price ... 737

——S. 58 —Mortgage by conditional sale—Sale and agreement to re-sell—Intention of the parties—Terms of the document ... 385

——S. 91—Son interested as reversionary heir of father to redeem latter's property—charge or amount paid to set aside Court sale ... 622

Trustee — Compromise by, and decree on foot of—Validity as against trust—Conditions — Hindu Law — Joint family — father — will bequeathing properties to charity — Son's suit to set aside will on ground that properties bequeathed were joint family properties over which father had no disposing power —Compromise by which some of properties taken by son—Validity—Suit by executor—trustee to set aside decree—Limitation Act, Art. 120—Applicability—Son brought in as trustee by compromise though testator expressly excluded him—Validity of compromise to that extent ... 801

Trust—Assignment of arrears of rent—Assignee to pay half of net collections to assignor—If former trustee for latter—Insolvency of assignee—If assignor only an unsecured creditor ... 528

Trust deed—Construction—Property title to which is subject-matter of suit—Trust deed in respect of—Management of property, conduct of suit, etc., with regard to same—Power of vested in trustee for preservation of property—Borrowing for purposes of suit—Power of, of trustee and of—settlor—Creditors right to lien on property gained by litigation ... 93

Trust—Trustee — Appointment—Founder's descendants in male line—Last survivor of—Right of—Appointment by such survivor—Validity—Property of trust alleged to belong to survivor as proprietor—Effect ... 361

ZAMINDARI. PAGE.

Trusts Act, Ss 82 and 90—Setting aside of court sale by benamindar equivalent to repurchase—Real owner entitled to property subject to repayment of decree-amount—charge on the property for the latter ... 622

——S. 90—Co-owners—Joint patta land—Default in payment of Government revenue by owner of one plot—Purchase at revenue sale by joint pattadar—Purchaser if a trustee for defaulter—Collector—Powers of with reference to revenue sales—Notice to persons affected by order—Necessity for ... 755

Vendor and purchaser—Agreement for purchase of mortgaged property—Breach of—Marketable title—Vendor's duty to make out—Breach of—Agreement— Construction—Penalty—Provision in agreement by way of Contract—Act, S. 74 ... 145

Void and Voidable transactions—Contract by guardian on behalf of minor—Voidable at instance of minor—Not void (F. B.) 205

Words and phrases—Kandayam ... 598

——Enjoy—Not necessarily importing limited estate ... 723

—— *Kumris*—Government *Kumris* and *wargkumris* (P. C.) 35 *at* 41

—— *Wargs* and *muliwargs*— (P. C.) 35 *at* 41

—— " Rent " in Madras Act (V of 1884) Whether means license fee from licensee to tap trees on an inam. 383

——"Tenant" in Madras Act (V of 1884) —Whether includes licensee of right to tap date trees—Quaere ... 383

——Thavanai—Meaning—Whether imports idea of credit 844

Zamindari—Lands in, dedicated as cattle-paths prior to Permanent Settlement—Declaration of Zemindar's right to—Suit for—Villagers using lands as cattle-paths if necessary parties to—Maintainability of suit against Government—Conditions—Onus of proof on Zamindar—Land Encroachment Act of 1905—Penal assessment—Levy of, from occupants of lands let in by Zemindar —If affords cause of action of Zemindar —S. 7 of Act—Preliminary notice under —If affords cause of action—Regulation XXV of 1802, S. 4—Lakhiraj lands—Public roads if ... 784

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